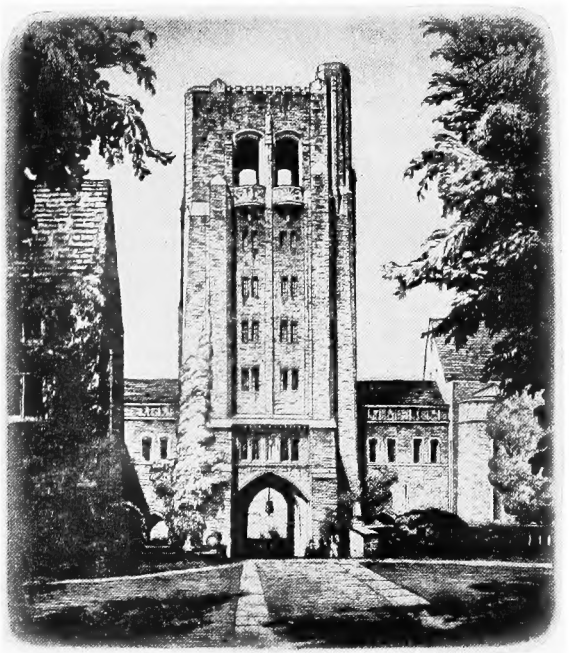
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FORMS

OF

INSTRUCTIONS TO JURIES

IN

CIVIL AND CRIMINAL CASES

INCLUDING

APPROVED PRECEDENTS

BY

DE WITT C. BLASHFIELD

AUTHOR OF "A TREATISE ON INSTRUCTIONS TO JURIES" TO WHICH THIS IS A SUPPLEMENTAL VOLUME.

ST. PAUL, MINN.

KEEFE-DAVIDSON CO.

1903.

B 49888

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WEBB PUBLISHING CO. PRESS, ST. PAUL.

PREFACE.

This book is a companion volume to the author's former treatise, and is issued to meet a very general request for additional forms.

The treatment is by topics alphabetically arranged for easy reference. The aim has been to give the greatest number of useful forms, rather than to make each particular topic exhaustive. Approved forms have been given preference. Those which have not been directly passed upon are supported by citations, except in a few instances where it is believed that to cite but one or two authorities, when many might be given, would be misleading and serve no good purpose.

D. C. B.

FORMS OF INSTRUCTIONS.

CHAPTER I.

ABDUCTION.[1]

Manner of taking, 1, 2.
Ignorance of female's age no defense, 3.
Female in temporary custody of collateral relative, 4.
Accomplishment of purpose not necessary, 5.
Chastity of female presumed, 6.
Purpose of concubinage—What constitutes, 7.
Purpose of prostitution—What constitutes, 8.
Negligence of parents a defense, 9.

Manner of taking.

(1) The court instructs the jury that to constitute abduction the female must have been taken or enticed away by defendant and if she went of her own free will without enticement or persuasion by him he is not guilty, but neither force nor fraud need have been used. If the female was induced to go by solicitation and enticement it is sufficient.[2]

(2) The jury are instructed that if defendant induced the woman to leave her home and go with him by presents and solicitation and being moved by such inducements she did go he is guilty of "taking" her away.[3]

Ignorance of female's age no defense.

(3) The jury are instructed that under the statute the female abducted must at the time have been less than ———

[1] See Criminal Law for forms of instructions applicable to crimes generally.

[2] State v. Jamison, 38 Minn. 21; People v. Plath, 100 N. Y. 590; Sencker v. People, 88 N. Y. 192; Slocum v. Same, 90 Ill. 274.

[3] State v. Johnson, 115 Mo. 480.

years of age, but if the jury find that she was in fact under such age, the fact that defendant had good reason to believe and did believe that she was over such age is no defense.[4]

Female in temporary custody of collateral relative.

(4) The jury are instructed that if the female was living in the family of her uncle as a member of his family and had no parent or guardian in the state and was wholly under the protection and care of said uncle, then she was under the control of said uncle within the statute provided she was under fifteen years of age and there by the consent of her parents, which consent may be proved by the relationship of the family and the length of time she had been there in the absence of other testimony.[5]

Accomplishment of purpose not necessary.

(5) The court instructs that if the jury believe from the evidence that the defendant took or enticed the female from the control of her parents (or from the person having lawful charge of her) for the purpose of prostitution (or whatever the statutory purpose may be) the offense was thereby completed and it was not needful that illicit sexual intercourse be had with her.[6]

Chastity of female presumed.

(6) The jury are instructed that though it is essential to the offense that the female be of previous chaste character, her chastity is presumed, and need not be proved by the state, but the burden is on defendant to impeach it.[7]

Purpose of concubinage—What constitutes.

(7) The jury are instructed that the taking must have been for the purpose of concubinage and a taking for the

[4] State v. Johnson, 115 Mo. 480.

[5] State v. Ruhl, 8 Iowa, 447; and see State v. Round, 82 Mo. 679.

[6] Berger v. People, 86 N. Y. 369; Henderson v. People, 124 Ill. 614.

[7] Bradshaw v. People, 153 Ill. 156.

purpose of a single act of sexual intercourse is not sufficient. But no particular continuance of illicit intercourse is necessary to constitute concubinage. That relation is formed when a woman consents to unlawfully cohabit with a man generally as though the marriage relation existed between them.[8]

Purpose of prostitution—What constitutes.

(8) The jury are instructed that prostitution means common indiscriminate sexual intercourse with men, and if defendant took the female from her home for the sole purpose of having sexual intercourse with her himself, he is not guilty.[9]

Negligence of parents a defense.

(9) If the jury believe from the evidence that the parents of the female alleged to have been abducted encouraged her by their conduct in a lax course of life, permitted her to be out alone at night and to attend places of questionable repute, the enticement of the girl away from them for the purpose named in the statute cannot be said to be against their will though they never actually knew of or consented to it, and defendant must be acquitted.[10]

[8] Henderson v. People, 124 Ill. 607.

[9] Com. v. Cook, 53 Mass. 93. See State v. Stoyell, 54 Me. 24; State v. Osborn, 52 Ind. 526.

[10] Approved in Reg. v. Primalt, 1 F. & F. 50. See, also, State v. Stone, 106 Mo. 1.

This instruction is probably applicable only where the statute states that the taking must be "against the will" of the parent or guardian.

CHAPTER II.

ABORTION.*

Elements of homicide by abortion, 10.
Intent to produce miscarriage an essential, 11.
Threat of suicide by woman no defense, 12.
Advice of physician a defense, 13.
What constitutes aiding and abetting, 14.

Elements of homicide by abortion.

(10) The court instructs the jury that in order to the conviction of the prisoner, it must appear, beyond a reasonable doubt:

First. That the deceased, next before her death, was pregnant with child.

Second. That the deceased, being so pregnant with child, the prisoner, with intent to procure a miscarriage of the deceased used, or caused to be used, upon the person of the deceased, some instrument, or administered, or caused to be administered, to the deceased some noxious drug or substance, or both used such instrument and administered such drug or substance.

Third. That, by reason of the use of such instruments, or the administration of such noxious drug or substance, or by reason of both, the deceased came to her death. It is not necessary that the prosecution should show the particular kind of drug or substance administered, nor that it was calculated to produce the miscarriage, nor what particular kind of instrument was used. Neither is it necessary that it should appear by the evidence that the prisoner, with her own hands, used any instrument upon the person of deceased, or that, with her own hands, prisoner administered to the deceased any drug or substance. If prisoner furnished any instrument to deceased or any other person with intent that deceased or any other person should use such instrument for the purpose of procuring the miscarriage of deceased, she being then pregnant, or if prisoner provided any noxious drug

* See Criminal Law for forms of instructions applicable to crimes generally.

or substance with intent that deceased, being then pregnant, should administer the drug or substance to herself, or that any other person should administer it to her in order to produce the miscarriage of the deceased, prisoner thereby constituted the deceased, or the person to whom such instrument or drug was delivered or provided, her agent, and is accountable for all the acts of such person done in pursuance of the agency. And if such person, whether the deceased herself or any other, used such instrument upon the person of deceased, or administered such drug to deceased with the intent to produce the miscarriage of deceased, and by reason of such treatment the deceased came to her death, the prisoner is guilty as charged in the indictment, even though she was not present at the time of the use of the instrument or administration of the drug.[1]

Intent to produce miscarriage an essential.

(11) The jury are instructed that an intent to produce a miscarriage is essential, and therefore, if the jury believe from the evidence that defendant unlawfully assaulted and beat a pregnant woman and thereby caused a miscarriage he is not guilty if he did not intend to produce that result.[2]

Threat of suicide by woman no defense.

(12) The jury are instructed that the danger to the life of the mother which will justify the production of a miscarriage must be a danger arising from natural causes, and the fact that she has threatened to commit suicide unless the miscarriage is produced is no defense though defendant believed in good faith that she would carry out such threat.[3]

Advice of physician a defense.

(13) The jury are instructed that if they believe from the

[1] Approved in Solander v. People, 2 Colo. 48.

By elimination of the words in paragraph three as to death resulting from the operation, the instruction is applicable to a prosecution for abortion.

[2] Slattery v. People, 76 Ill. 217.

[3] Hatchard v. State, 79 Wis. 357.

evidence that a physician advised that the production of a miscarriage was necessary to save the life of the woman, and that defendant acted in good faith on such advice he must be acquitted though the physician was in fact mistaken as to the necessity.[4]

What constitutes aiding and abetting.

(14) The jury are instructed that though they believe that an abortion was actually performed on ——— and that defendant knowing of her intention to have the same performed accompanied her to the office of ——— who performed the same, remaining in an adjoining room, such acts do not constitute a participation in the offense, and if defendant did not in any other manner aid abet or encourage the operation he is not guilty.[5]

CHAPTER III.

ABUTTING OWNERS.

Right to have street maintained free from obstruction, 15.
Liability for injuries to passers-by, 16, 17.

Right to have street maintained free from obstruction.

(15) The court instructs the jury that if the defendants were guilty of maintaining a nuisance by obstructing the public highway as claimed, and the jury further find that the effect thereof was to prevent the free ingress and egress to plaintiff's place of business, and that this caused to the plaintiff a loss of trade and custom in his business as a merchant, then the defendants would be liable.[1]

[4] State v. Fitzporter, 93 Mo. 390.

In some states the concurring opinion of two physicians is required by statute. See State v. Hatchard, 79 Wis. 357.

[5] People v. McGonegal, 136 N. Y. 62.

[1] Approved in Park v. Chicago & S. W. R. Co., 43 Iowa, 636.

Liability for injuries to passers-by.

(16) The court instructs the jury that the plaintiff in this case is suing for injuries received while passing the premises of the defendant by falling into a coal-hole which had been excavated under the side-walk in front of the premises of defendant. Now the court instructs the jury that the defendant is only held to the exercise of ordinary care and diligence with regard to such coal-hole, and in considering the question as to whether defendant has exercised ordinary care you will consider such circumstances as the location of the coal-hole; that the coal-hole was in a highway; the amount of travel upon the highway; what was the original construction of the coal-hole; whether there was a sound cover over it; whether defendant had any reason to believe that the coal-hole was out of order; whether any complaint was ever made to him or to his agents. You will also consider how many persons were in the habit of using the coal-hole, and whether the number of persons using the hole would increase or decrease the care required from the defendant, and after considering all the circumstances as shown by the evidence you will determine whether the cover of the coal-hole was in a dangerous condition by reason of such a lack of care as should have been exercised by the defendant with reference to it.[2]

(17) The court instructs the jury that the defendant is only held to the exercise of ordinary care and diligence with reference to the coal-hole in front of the defendant's premises, into which the plaintiff alleges he fell, and by reason of the fall sustained the injuries here sued for. The defendant had a right to use that part of his premises under the side-walk, provided he exercised due care with reference to people passing over it. The fact that the part of his premises under the side-walk was a part of the street will not prevent him from using his land, provided he use proper care for the safety of such persons as had occasion to use the side-walk,

[2] Stevenson v. Joy, 152 Mass. 45.

and defendant is not to be held responsible merely because of the existence of the coal-hole, nor from the fact that there was an excavation under the side-walk, but the defendant is held responsible for such care as should be exercised under the circumstances.[3]

CHAPTER IV.

ACCORD AND SATISFACTION.

What constitutes, 18, 19.
Reception of less amount as satisfaction, 20.
Same—Acceptance of check, 21.
Same—Necessity of compliance with conditions, 22.
Giving note as an accord and satisfaction, 23.
Part payment and surrender of instrument, 24.

What constitutes.

(18) The court instructs the jury that to constitute an accord and satisfaction of a claim unliquidated and in dispute it is necessary that the money should be offered in satisfaction of the claim and the offer accompanied with such acts and declarations as amount to a condition that if the money is accepted it is to be in satisfaction, and such that the party to whom it is offered is bound to understand therefrom that if he takes it, he takes it subject to such condition.[1]

(19) The jury are instructed that the only issue before them is the question of settlement between the plaintiffs and the defendant, or, accord and satisfaction as set forth by the defendant in his answer, and that accord and satisfaction is an agreement between a creditor and his debtor, by which the creditor agrees to take and receive something from his debtor in lieu and satisfaction of his claim. If the property or thing

[3] Stevenson v. Joy, 152 Mass. 45.

[1] Kingsville Preserving Co. v. Frank, 87 Ill. App. 586; Lang v. Lang, 83 Ill. App. 543.

to be given by the debtor to the creditor is received and accepted by the latter in settlement of his claim, it has the effect of payment, and extinguishes his claim. Anything valuable may be given by the debtor to the creditor, whether specific property or goods, or a transfer of claims or rights belonging to the debtor, (and if the jury believe from the evidence that in the month of ——— or at any time since the maturity of the notes sued on in this case, the defendant and the plaintiff agreed upon a settlement, by which the defendant was to assign and transfer to the plaintiff a certain claim of inheritance belonging to the wife of the defendant, and if the jury further believe from the evidence that this basis of settlement was carried out by the parties; that is to say, that the defendant and his wife executed an assignment and transfer of said claim of inheritance to plaintiff, and that the said claim of inheritance was delivered to and accepted by the plaintiff in full satisfaction of the claim of plaintiff against the defendant, then the jury will find for the defendant).[2]

Reception of less amount as satisfaction.

(20) The court instructs the jury that a person cannot pay and satisfy a debt by the payment of a sum less than the debt; but if you believe from the evidence that the plaintiff, in order to avoid a suit, of the result of which he was doubtful, agreed to receive any sum in full satisfaction of the amount he claimed to be due on said account, and upon such agreement the defendant paid the sum agreed upon, then such agreement and payment would completely discharge the defendant from all liability.[3]

Same—Acceptance of check.

(21) The court instructs the jury that the acceptance of a check for less than the sum claimed may amount to an accord and satisfaction, and that if you believe from the evi-

[2] American v. Rimpert, 75 Ill. 228.

[3] Approved in Ogborn v. Hoffman, 52 Ind. 439.

dence (here state facts surrounding acceptance of check, as where check was sent and the creditors collected the check but wrote that they had agreed to accept it on account, to which defendant replied that if they retained the amount accepted they would be expected to do so in full payment,) then your verdict will be for defendant.[4]

Same—Necessity of compliance with conditions.

(22) The court instructs the jury that a payment under an agreement to accept less than the whole debt if paid by a certain day, is not a discharge unless the condition is strictly complied with.[5]

Giving note as an accord and satisfaction.

(23) The court instructs the jury that if you find from the evidence that the debtor gave his note indorsed by a third person as further security for a part of the debt and if you further find that the note was accepted by the creditor in full satisfaction of all demands, your verdict will be for the defendant.[6]

Part payment and surrender of instrument.

(24) The court instructs the jury that where there is a bona fide dispute between the maker and payee of notes as to the date from which interest is payable under the terms of the notes which are ambiguous; and the maker pays the amount he admits to be due on the express condition that the notes and mortgages securing the same shall be cancelled and surrendered, and the payee accordingly receives the money and cancels and surrenders the mortgages, there is an accord and satisfaction.[7]

[4] Bernard v. Henry Werner Co., 19 Misc. Rep. (N. Y.) 173.
[5] Inman v. Griswold, 1 Cow. (N. Y.) 199.
[6] Boyd v. Hitchcock, 20 Johns. (N. Y.) 76.
[7] Storch v. Dewey, 57 Kan. 370.

CHAPTER V.

ACCOUNT STATED.

Formal requisites in general, 25, 26.
Assent to account as rendered, 27.
Same—Retention of account as acquiescence, 28.
Same—Failure to object to items, 29.
Account stated with agent of one of the parties, 30.
Opening account, 31.
Same—Burden of proof to impeach, 32, 33.

Formal requisites in general.

(25) The court instructs the jury that no particular form of words is necessary to constitute a settlement, nor is it necessary to prove a promise to pay the balance found to be due, provided a balance be found in the party's favor.[1]

(26) The court instructs the jury that it is essential to an account stated that there be an examination of the claims by each party, and an agreement, express or implied, as to the correctness of the allowance of the amount of their respective claims and of the balance struck on the adjustment of the account.[2]

Assent to account as rendered.

(27) The court instructs the jury that to make an account stated there must be a mutual agreement between the parties as to the allowance or disallowance of their respective claims, and to establish such an account so as to preclude a party from impeaching save from fraud or mistake, there must be proof of assent to the account as rendered, either express or implied from failure to object within a reasonable time after presentation.[3]

[1] Approved in Brewer v. Wright, 25 Neb. 805.

[2] Stenton v. Jerome, 54 N. Y. 480; Murphy v. Ross, 26 Wkly. Dig. (N. Y.) 124; Smith v. Harris, 26 Wkly. Dig. (N. Y.) 323; Allen v. Woonsocket Co., 11 R. I. 288; Bussey v. Gant, 29 Tenn. (10 Humph.) 238.

[3] Stenton v. Jerome, 54 N. Y. 480.

Same—Retention of account as acquiescence.

(28) The court instructs the jury that where an account rendered is not objected to within a reasonable time, the failure to object will be regarded as an admission of its correctness by the party to be charged, and what is a retention for a reasonable time is to be determined by all the circumstances of the case.[4]

Same—Failure to object to items.

(29) The jury are further instructed that he who has been silent as to his alleged rights when he ought to have spoken is not permitted to speak when he ought to be silent; and if you believe from the evidence in this case that the plaintiff received, from time to time, from the defendant statements of his account with the defendant and was thereby afforded the opportunity to see the items in his bill of particulars mentioned charged against him, and remained silent and did not object to the charge of such items against him within a reasonable time after each of such items was so rendered, then the defendant had the right to infer acquiescence of the plaintiff in the correctness of such charges and the plaintiff is now estopped to deny the correctness of all such items to which he did not object in proper time; and, as to all such items of the plaintiff's account, you must find for the defendant.[5]

Account stated with agent of one of the parties.

(30) The court instructs the jury that a recovery cannot be had on the basis of an account stated made with plaintiff's agent, without proof that he was an authorized agent of the party he claimed to represent at the time, or there was a subsequent ratification of his act.[6]

[4] White v. Hampton, 10 Iowa, 238; Darby v. Lastrapes, 28 Lans. (N. Y.) 605.

[5] Approved in Shrewsbury v. Tufts, 41 W. Va. 212.

[6] Mank v. Morrison, 42 Mich. 567; Harvey v. West Side Elevated R. Co., 13 Hun (N. Y.) 392.

Opening account.

(31) The court instructs the jury that if they believe from the evidence that from time to time the officers or agents of the plaintiff and defendant in this suit met and looked over their accounts together, and settled all matters between them and struck a balance, and agreed upon that as the amount due from one to the other, then, in the absence of mistake or fraud, neither party will be allowed to go behind that settlement for the purpose of increasing or diminishing the amount so agreed upon.[7]

Same—Burden of proof to impeach.

(32) The court instructs the jury that a strong presumption arises that a settlement of account between parties embraces all the items each has against the other which are due, and to overcome this presumption it devolves on the party asserting the contrary to prove that the item was not due or that it was by consent of the parties omitted from the settlement or omitted by accident or unintentionally by the party claiming.[8]

(33) The jury are instructed that the burden of proof is on the plaintiff to make out his case by a preponderance of the evidence. In this case the plaintiff's claim, according to his bill of particulars, is for commissions alleged to have been retained improperly, and not paid to him, as shown by statements of account rendered and filed with said bill of particulars; and the jury are instructed that the burden is on the plaintiff to show by a preponderance of the evidence that the items referred to in such statement of accounts, and charged in his bill of particulars, are not lawful charges against the plaintiff; otherwise he is not entitled to recover in this action and you must find for the defendant.[9]

[7] Approved in Gottfried Brewing Co. v. Szarkowski, 79 Ill. App. 583.

[8] Straubher v. Mohler, 80 Ill. 21.

[9] Approved in Shrewsbury v. Tufts, 41 W. Va. 212.

CHAPTER VI.

ACCRETIONS.

In general, 34.
Title to land created by recession of river, 35-38.

In general.

(34) The court instructs the jury that when the United States surveyed the land through which the Des Moines river flowed, and abutting thereon, on either side of said river, the same was treated as a navigable river, and the land along its shores was meandered on both sides of said river, and the space between the meander lines on each shore was excluded in calculating the number of acres in any section or part thereof through which said river flowed; and the purchasers of the tracts of land abutting upon said river acquired title to the meander line of said river, but at the same time became what is known in law as "riparian owners," so that the encroachment by the river upon their land, and washing away, would be their loss, and at the same time any accretions made by the river to their land abutting upon said river would inure to their benefit and become their property, and hence, if you find from the evidence in the case that on the south side of the river, and east of the line 60 rods west of the east line of said section there have been accretions to the land in said section 16, abutting upon said river, by reason of which the quantity of land abutting thereon has been increased, then such increase would inure to the benefit of the abutting owner thereof, and if the plaintiff was such abutting owner thereof on the south side of said river it would inure to her benefit, but only to the extent to which the same was added to her land abutting thereon, and included in said southeast quarter section, east of the 60-rod line.[1]

[1] Approved in Dashiel v. Harshman, 113 Iowa, 283.

Title to land created by recession of river.

(35) The court instructs the jury that under the law of this state, persons owning land on or bounded by the Mississippi river own to the water's edge, and when the water recedes gradually and land is made thereby, the owner of the land bounded by the river is owner of the land so made, and such owner's right to such land remains equal to his river front and such riparian rights cannot be encroached upon by adjoining owners so running their boundary lines as to diminish such river front or accretions.[2]

(36) The court instructs the jury that if they believe from the evidence that the land and premises described in plaintiff's petition and of which the defendants were in possession at the time of the institution of this suit were and are not within the boundary line of survey 1922, nor are any part thereof, nor are any accretion thereto, but that they are within the original boundary line of Island 73 in Missouri river, and the accretions thereto, and that defendants held and hold the possession wrongfully from the plaintiff, then they will find for the plaintiff.[3]

(37) The court instructs the jury that although they may believe that Island 73, section 6, township 44, range 1, west, at any time was washed away entirely or in part after the same was surveyed and patented by the United States government, yet, if they further find that the land in controversy is a reformation of said Island on the bed of the river where such Island formerly existed, then plaintiff is entitled to recover in this action if it be shown that the defendant unlawfully detained the same.[4]

(38) The court instructs the jury that if they believe from the evidence that a slough or arm of the Missouri river ran between Island 73 and survey 1922, at the time of making the United States survey, and that since that time the same

[2] Approved in Benne v. Miller, 149 Mo. 228.
[3] Approved in Buse v. Russell, 86 Mo. 209.
[4] Approved in Buse v. Russell, 86 Mo. 209.

has been filled up so as to connect the Island with the main land and make the Island and survey one continuous tract of land, then the adjacent owners of Island 73 and survey 1922 are entitled to the accretions to their respective land, but if the slough merely filled up from the bottom or by deposits within the bed of said slough and said accretions did not form on one side or the other, then the center of the slough as it was before the water deserted it is the boundary between said survey and said Island.[5]

CHAPTER VII.

ACT OF GOD.

Definition, 39.
Same—Where accident would have befallen in any event, 40.
Negligence of carrier co-operating with act of God, 41.
Intervention of human agency, 42.
Burden of Proof—Rule in United States, Iowa, Maryland, Massachusetts, Missouri, New York, and Pennsylvania, 43.
Same—Rule in Alabama, Illinois, Georgia, Minnesota, Ohio, Texas, and West Virginia, 44.

Definition.

(39) The court instructs the jury that by the expression "act of God" is meant some destructive occurrence which could not have been occasioned by the intervention of man, but which proceeds from natural causes alone, such as the violence of the elements or natural accident. It must be such that it was impossible to be guarded against.[1] And if the jury find from the evidence that the (state what the casualty was, as a "freshet") which is alleged to have occasioned the loss was (unprecedented in volume and violence),[2] and was

[5] Approved in Buse v. Russell, 86 Mo. 209.

[1] Forward v. Pitard, 1 T. R. 27, per Lord Mansfield.

[2] Change these words to correspond with the nature of the occurrence which is alleged as the act of God. If, for instance, it was a

not such as human foresight or human precaution could have guarded against, and if no act of man intervened as a contributing cause to the loss, then you will find for the defendant.

Same—Where accident would have befallen in any event.

(40) The court charges that defendant is entitled to a verdict if the facts show that the (state what constituted the act of God, as a "tornado") must necessarily have caused the loss in question no matter how careful defendant was; although as a matter of fact you find that he was negligent in not (state what he omitted as "keeping his vessel safe and seaworthy").[3]

Negligence of carrier co-operating with act of God.

(41) The court instructs the jury that an act of God affords no defense to a carrier for failure to deliver the goods shipped, where the carrier's own negligence entered into and was a part of the cause of the loss, and if the jury find from the evidence that (state the facts e. g. the destruction of defendant's vessel was due to a violent and unprecedented storm, but that the vessel was not safe and seaworthy), and that defendant had not exercised the highest degree of care (state wherein he was negligent e. g. in not keeping her seaworthy), then you must find for the plaintiff.[4]

Intervention of human agency.

(42) The court instructs the jury that if they find from the evidence that there was (state what, e. g. a violent storm) by reason of which (state what was the condition produced

hitherto unknown rock in a channel, say—"theretofore unknown to defendant and was not generally known or charted and could not have become known to defendant by extraordinary diligence on his part."

[3] New Brunswick Steamboat, etc., Co. v. Tiers, 24 N. J. L. 697, 64 Am. Dec. 397; Hart v. Allen, 2 Watts (Pa.) 114.

[4] New Brunswick Steamboat, etc., Co. v. Tiers, 24 N. J. L. 697, 64 Am. Dec. 397; Hart v. Allen, 2 Watts (Pa.) 114.

resulting in the loss e. g. an unusually low tide was produced, and that during such low tide, the defendant's barge was sunk by coming in contact with a bulkhead which in any ordinary low tide would have been too far below the surface to come in contact with the barge) defendant is not excused from liability for the loss to plaintiff's goods, resulting from (state what happened e. g. the sinking of the barge).[5]

Burden of proof—Rule in United States, Iowa, Maryland, Massachusetts, Missouri, New York, and Pennsylvania.

(43) The court instructs the jury that the burden is upon the defendant to establish by evidence that the loss or damage in question was caused by an act of God, and if the jury so find, then unless the plaintiff has satisfied you by his evidence that the defendant has been guilty of negligence entering into and co-operating with the act of God in producing such loss you will find for the defendant.[6]

Same—Rule in Alabama, Illinois, Georgia, Minnesota, Ohio, Texas, and West Virginia.

(44) The court instructs the jury that the burden of proof is upon the defendant to satisfy the jury by his evidence not only that the loss or injury was occasioned by the act of God, but also that defendant exercised all due care and diligence in the performance of his duty, and was not in any manner negligent in the doing of any act that might have averted the loss.[7]

[5] The bulkhead which was a human intervention was the proximate cause of the loss and the act of God was only the remote cause. New Brunswick Steamboat, etc., Co. v. Tiers, 24 N. J. L. 697, 64 Am. Dec. 397.

[6] Memphis, etc., R. Co. v. Reeves, 10 Wall. (U. S.) 189; Wirtheimer v. Pennsylvania R. Co., 17 Blatch. (U. S.) 421; Denton v. Chicago, etc., R. Co., 52 Iowa, 161, 35 Am. Rep. 263; Baltimore, etc., R. Co. v. Brady, 32 Md. 333; Mayo v. Preston, 131 Mass. 304; Davis v. Wabash, etc., R. Co., 89 Mo. 340; Lamb v. Camden, etc., R. Co., 46 N. Y. 271, 7 Am. Rep. 327; Magnin v. Dinsmore, 56 N. Y. 173; Collon v. Cleveland, etc., R. Co., 67 Pa. St. 211, 5 Am. Rep. 424.

[7] Steele v. Townsend, 37 Ala. 247, 79 Am. Dec. 49; Adams Exp.

CHAPTER VIII.

ADJOINING LANDOWNERS.

Liability for injuries to building by excavation on adjoining lot, 45, 46.
Same—Notice of intention to make excavation, 47, 48.

Liability for injuries to building by excavation on adjoining lot.

(45) The court instructs the jury that if they believe from the evidence that the east and south walls of the house at ——— were in a bad condition before the commencement of the digging by the contractor under the foundation wall of the defendant's house, and that the settling and cracking thereof were caused by their own inherent defects and not by the digging by the defendant of his cellar in the year ——, then the plaintiff is not entitled to recover for any injury to her property caused by such settling and cracking.[1]

(46) The court instructs the jury that if they shall believe that the house at ——— was in a ruinous and dilapidated condition before the contractor commenced work upon premises of the defendant adjoining it on the east, and shall not find that by reason of such work it became more ruinous and dilapidated to an extent which impaired its rental value, then under the pleadings and all the proof in the cause, the plaintiff cannot recover, and their verdict must be for the defendant.[2]

Same—Notice of intention to make excavation.

(47) The court instructs the jury that if they shall find

Co. v. Stettaners, 61 Ill. 184, 14 Am. Rep. 57; Berry v. Cooper, 28 Ga. 543; Shriver v. Sioux City, etc., R. Co., 24 Minn. 506, 31 Am. Rep. 353; Graham v. Davis, 4 Ohio State, 362, 62 Am. Dec. 285; Ryan v. Missouri, etc., R. Co., 65 Tex. 13, 57 Am. Rep. 589; Brown v. Adams Exp. Co., 15 W. Va. 812. See, also, Belle v. Reed, 4 Denny (Pa.) 127, 5 Am. Dec. 398, in which it was held that a vessel owner must prove seaworthiness before he could set up the act of God.

[1] Approved in Bonaparte v. Wiseman, 89 Md. 12.

[2] Approved in Bonaparte v. Wiseman, 89 Md. 12.

that the work done upon the defendant's premises by which the house known as ——— is alleged to have been injured, was done by ——— contractor under the written contract offered in evidence and shall further find that a reasonable time before any excavation below the foundation of said house was made, the plaintiff was notified or had actual knowledge that such excavation was about to be made, then, under the pleadings and the evidence in the cause, their verdict must be for the defendant.[3]

(48) The court instructs the jury that if they find from the evidence that a reasonable time before the contractor commenced to dig under the foundation wall of the defendant's house next to the premises at ———, on the east, but separated from it by an alley about — ft. wide, the defendant notified the plaintiff of his intention to do so; and shall further find that afterwards the said contractor did dig under said foundation wall upon the defendant's ground, and in so doing exercised reasonable care to prevent the ground under the bed of the said alley from caving in, then the plaintiff is not entitled to recover, though the jury may believe that the east and south walls of the plaintiff's house or either of them settled and cracked by reason of the excavation made by the said contractor.[4]

CHAPTER IX.

ADULTERY.*

Occasional acts of fornication insufficient, 49, 50.
All circumstances in evidence to be considered, 51.

Occasional acts of fornication insufficient.

(49) The court instructs the jury that if they shall find from the evidence that the defendants were not living to-

[3] Approved in Bonaparte v. Wiseman, 89 Md. 12.
[4] Approved in Bonaparte v. Wiseman, 89 Md. 12.

* See Criminal Law for forms of instructions applicable to crimes generally.

gether in a state of open and notorious adultery but were simply at the time charged in the information stopping together in the same room occasionally, and were only guilty of occasional acts of illicit intercourse, then the court should find the defendants not guilty.[1]

(50) The court instructs the jury that the burden of offense is the open, lewd, lascivious conduct of the parties living together as husband and wife. It is the publicity and disgrace, the demoralizing and debasing influence, that the law is designed to prevent. If, therefore, you find from the evidence in this case that the defendant and said C. lived together in the same house, in the relation of master and servant, and not as husband and wife, and that they only had occasional acts of sexual intercourse, and these in a secret manner, such facts alone would not be sufficient to constitute the crime charged against defendant in this case.[2]

All circumstances in evidence to be considered.

(51) But the crime charged may be shown by circumstances, in connection with the other evidence in the case, if such circumstances are sufficient in connection with such other evidence to satisfy you beyond a reasonable doubt that the crime has been committed as charged in the indictment, under these instructions; and, in determining whether said parties were or were not living together as husband and wife, it is proper for you to consider any and all acts of sexual intercourse, if any have been shown by the evidence; the fact, if you find it to be a fact, that a child was born to the woman while she was living with defendant; and all other facts and circumstances disclosed by the evidence as surrounding the parties while living together.[3]

[1] State v. Crowner, 56 Mo. 147.
[2] State v. Kirkpatrick, 63 Iowa, 554.
[3] State v. Kirkpatrick, 63 Iowa, 554.

CHAPTER X.

ADVERSE POSSESSION.

I. Definition and Elements.
In general, 52-59.
Possession without title, 60.
Action of trespass by one claiming title by adverse possession, 61, 62.

II. Hostility in Inception and Continuance Thereof.
Intention to hold adversely, 63-65.
Hostility in inception, 66, 67.
Holding by tenant as adverse to landlord, 68.
Holding by vendee as adverse to vendor, 69.
Necessity of notice of occupancy to owner, 70.
Necessity of claim of title, 71.
Character of proof to support, 72.

III. Color and Source of Title.
Color of title, 73-75.
Claim of land as street, 76.
Distinction between color of title and claim of title, 77.
Conflict between paper title and rights acquired by possession, 78.
Source of title, 79.

IV. Requisites of Actual Possession.
In general, 80-82.
Sufficiency of entry, 83.
Cultivation and improvements, 84-88.
Inclosure, 89-91.
Use of premises for storage purposes, 92.
Cutting grass or fire wood, 93, 94.
Possession by tenant, 95.
Payment of taxes, 96.

V. Extent of Possession.
Whether adverse holding limited to actual occupancy, 97-99.
Same—Accretions, 100, 101.

VI. Duration of Possession in General.
Continuity of possession, 102.
Possession against persons under disability, 103.
Tacking possession, 104-108.

I. Definition and Elements.

In general.

(52) The court instructs the jury that the question in this part of the case is whether the defendants, and those under whom they claim, have for a period of ——— had actual, open and exclusive adverse occupancy and possession of the land claimed to be owned by the plaintiff, such adverse possession being known and acquiesced in by the real owner, or so far notorious as to be presumptively within his knowledge.[1]

(53) The court instructs the jury that when a party claims to have acquired title to the lands of another by having held possession a length of time sufficient to bar the owner from retaking possession, he must, to succeed, show that his possession is of that exclusive, permanent, open, hostile, and adverse character as to put the owner in the position of failing to assert his rights, knowing, or having reason to know, they were encroached upon, for the full period of ———.[2]

(54) The court instructs the jury that, in order to divest the title to the land described in plaintiff's declaration out of the plaintiff and vest it in the defendant, by reason of his adverse possession, that possession must be actual, visible, notorious and hostile, continuous and uninterrupted, under a claim of title, for a period of (time prescribed by statute) next preceding the commencement of this suit.[3]

(55) The court instructs the jury that to constitute a bar to plaintiff's right to recover in this action defendants herein must show an actual occupancy of the premises in suit, clear, definite, notorious and hostile, and such occupancy must be continuous, adverse and exclusive during the whole period prescribed by the statute.[4]

[1] Approved in Merwin v. Morris, 71 Conn. 555.
[2] Approved in Hockmoth v. Des Grand Champs, 71 Mich. 520.
[3] Approved v. Dalby v. Snuffer, 57 Mo. 294.
[4] Approved in Davenport v. Sebring, 52 Iowa, 364.

(56) The court instructs the jury that the occupant who claims adverse possession must claim during the (time prescribed by statute) adverse to the true owner. This possession must be a possession undisturbed and open and under the open claim of ownership and must be adverse to the owner of record. This is a question of fact for you to decide on all the evidence in this case—whether the defendant and the parties who owned before him and occupied the premises have peaceably, openly and under claim of ownership to the exclusion of the plaintiff, occupied the premises in question.[5]

(57) The court instructs the jury that if you find from the evidence that the defendant entered into the occupation and possession of the premises in question claiming title thereto exclusive of and hostile to any other right, and that such claim of title was made in good faith, the defendant believing that he had a good title to such land as the owner thereof, and further find that such occupation and possession was actual and continued, uninterrupted and notorious and hostile to any other right or title to said land, for a period of (the period prescribed by statute) prior to the commencement of this action, and that during all that time the defendant so claimed title to said land, that would constitute adverse possession, and would bar plaintiff's right to recover in this action and your verdict in such case would be for the defendant.[6]

(58) The court instructs the jury if they find from the evidence that D. the ancestor of the defendants, bought at a tax sale held by the ———, the property in controversy in this case and paid the price bid by him at such sale and received from the ——— a deed to said property, which was by him duly filed for record and recorded in the ———

[5] Approved in McAvoy v. Cassivy, 60 N. Y. St. Rep. 827.
The use of the word "peaceably" was objected to, but held proper as limited and understood by the use of the word "undisturbed."
[6] Approved in Bartlett v. Secor, 56 Wis. 520.

more than (time prescribed by statute) prior to the commencement of this suit; that thereupon the said property was assessed to the said D. on the tax books of the city of W. and the taxes thereon from that time until the beginning of this suit were paid by the said D. or his successors in title, the defendants in this case; that at a period of time more than twenty years before the commencement of this suit the said property was rented on behalf of the defendants to a person who took the same and held possession thereof as tenant of the defendants for the purposes of a stone yard, paying rent therefor from the date of making such arrangement with the defendants, and that, although the said property was not inclosed by a fence, yet the person so renting the same, either upon the whole or a part thereof, during his occupancy deposited stone used by him in the business, and that such use and possession of the said property was continued by the occupant thereof actually, exclusively, continuously, openly, notoriously, adversely and uninterruptedly for a period of (time prescribed by statute) next before the commencement of this suit, then the jury is instructed that the defendants are entitled to recover.[7]

(59) The court instructs the jury that if the said defendant took possession of the land in dispute here sued for under claim of title and held and claimed it as his own adversely and continued to so hold it adversely against all the world, until the expiration of ——— from the time of his first taking possession, then this action is barred by the statute of limitations.[8]

Possession without title.

(60) The court instructs the jury that plaintiff's adverse possession would become perfect with the lapse of (time prescribed by statute) even if plaintiff originally had no shadow

[7] Approved in Holtzman v. Douglas, 168 U. S. 278.

[8] Sutton v. Clark, 59 S. C. 440.

The court held in this case that adverse possession for the statutory period confers a positive affirmative title.

of title, provided such adverse possession was so open that any other person could bring suit to eject the plaintiff.[9]

Action of trespass by one claiming title by adverse possession.

(61) The court instructs the jury that if they believe from the evidence that N. conveyed the entire boundary of land described in plaintiff's petition to W. on the — of ———, ——, and that said W. on the — of ———, ——, sold and conveyed the same property to the plaintiff H., and further believe from the testimony that in pursuance of such conveyance and under color thereof, they, the said W. and the plaintiffs entered into the actual possession of the lands so conveyed, claiming title thereto to the full extent of the boundary and title so conveyed, and that such possession of said land continued for (the period prescribed by statute) previous to the defendant's entry sued for, and during such period, their possession was actual, visible and notorious, then such possession is adverse and the jury should find for the plaintiffs and determine their damages as indicated in previous instructions.[10]

(62) The court instructs the jury that a title in fee was not essential to the maintaining of an action of trespass by one having actual possession against a stranger to the title and not in possession; and no person can purge a disseisin by an entry, who is not the true owner or who does not make the entry by authority of the true owner.[11]

II. Hostility in Inception and Continuance Thereof.

Intention to hold adversely.

(63) The court instructs the jury that such possession must be under a claim of title or right to the land occupied; or, in other words, the fact of possession, and the intention with which it was commenced and held, are the only tests. If, therefore, the intention of claiming the title to the land

[9] Approved in Beecher v. Ferris, 112 Mich. 584.

[10] Approved in Maysville & B. S. R. Co. v. Holton, 100 Ky. 665.

[11] Approved in Gardner v. Gooch, 48 Me. 487.

against the true owner is wanting, the possession will not be adverse, and, however long continued, will not bar the owner's right to recover.[12]

(64) The court instructs the jury that on the other hand, if when the defendants took possession of the strip of land in controversy he only intended to occupy and claim the government subdivision of the land described in his deed, but by mistake extended his possession too far north and included the disputed strip, and has since occupied and cultivated it with no intention of claiming it as his own, unless it was in fact included within the true boundaries of the land described in his deed, then his possession, however long continued, was not adverse; and if you so find, your verdict will be for the plaintiff.[13]

(65) The court instructs the jury that if at the date this suit was commenced the defendant had been in peaceful and exclusive possession of the land up to the north line of the disputed strip and cultivated and claimed it as his own, and such claim of ownership has been open, notorious and adverse to all the world for more than (time prescribed by statute), then his possession and claim has ripened into a good title, and if you so find, your verdict will be for the defendant. To be adverse, however, the holding or possession of the defendant must have been with the intention of insisting upon his right to the land in controversy as against all others and not by mere mistake as to the location of the line as fixed by the government survey.[14]

Hostility in inception.

(66) The court instructs the jury further that the defendants to make out a title by adverse possession must show that such possession was adverse in its inception, and where the

[12] Approved in Davenport v. Sebring, 52 Iowa, 364.

[13] Heinz v. Cramer, 84 Iowa, 497.

[14] Approved in Heinz v. Cramer, 84 Iowa, 497.

Provides for contingencies that statute of limitations might have been set in motion by agreement respecting line.

entry is under the title of the legal owner, the holder cannot controvert that title without an express disclaimer, or its equivalent, and the assertion of an adverse title with notice to the owner.[15]

(67) The court instructs the jury that adverse possession sufficient to defeat a legal title must be hostile in its inception and continue uninterruptedly for (time prescribed by statute). It must also be open, notorious, adverse and exclusive and must be held during all of such time under a claim of ownership by the occupant and all of these facts must be proved by a preponderance of the evidence.[16]

Holding by tenant as adverse to landlord.

(68) The court instructs the jury that there can be no adverse possession of lands where the possession is consistent with the title of the true owner, as where the occupant has leased or acknowledged the title of the claimant, and a tenancy once shown to exist is presumed to continue until the contrary be proven, and no adverse possession can be set up by the tenant or anyone entering upon the land under the tenant until full notice of the denial of landlord's title is brought home to the landlord, and the statute of limitations only begins to run from the time the landlord had such notice.[17]

Holding by vendee as adverse to vendor.

(69) The court instructs the jury that if you believe, from the evidence introduced on the trial of this case, that defendants purchased the land in controversy from ———, by an assignment of a contract of purchase from one J., and thereby derived the first claim they ever made to the land in suit, and afterwards sued and obtained the purchase money

[15] Approved in Maxwell v. Cunningham, 50 W. Va. 298.

[16] Approved in Hoffine v. Ewings, 60 Neb. 729, though court suggests the use of another word than "hostile," as that word savors of ill will.

[17] Approved in Reusens v. Lawson, 91 Va. 226.

paid for said land by their assignor, J., or themselves, by reason of an alleged want of title in said railroad company, then such action on the part of defendants amounts to an abandonment of all rights claimed or acquired by the defendants in and to the title to the land in question, up to the time of receiving such repayments of the purchase money, and their claim of title now made must commence from the date of the receipt of such purchase money, if you find such claim has been made by defendants.[18]

Necessity of notice of occupancy to owner.

(70) The court instructs the jury that the owner need not move to retake possession till he learns or ought to know that his lands are taken possession of.[19]

Necessity of claim of title.

(71) The court instructs the jury that if defendants, during the time they have held this land in dispute, only claimed to own the improvements made on said land, then no length of possession will give them title to the land in dispute; and in considering this case you will take into consideration the acts and declarations of the defendants and their statements of the claim made by them, and if the evidence offered upon the trial of this cause satisfies you that the claim of defendants was a claim for improvements only, then you must find for the plaintiffs.[20]

Character of proof to support.

(72) The court instructs the jury that adverse possession is not to be made out by inference, but by clear and positive proof.[21]

III. Color and Source of Title.

Color of title.

(73) The court instructs the jury that if they find that

[18] Approved in Davenport v. Sebring, 52 Iowa, 364.
[19] Approved in Hockmoth v. Des Grand Champs, 71 Mich. 570.
[20] Approved in Davenport v. Sebring, 52 Iowa, 364.
[21] Approved in Merwin v. Morris, 71 Conn. 555.

the plaintiff entered into possession of the land in dispute, under the paper introduced in evidence as exhibit A, purporting to be signed by R. under a claim of ownership, and if they find that he has personally or by his tenants continued in possession thereof for more than (time prescribed by statute), then the jury must find that he is presumed to have obtained a grant from the state.[22]

(74) The court instructs the jury that the party who relies on adverse possession of land under color or claim of title, to defeat the legal right of the owner of the land must show: 1. His color or claim of title and that it covers the land, or a part of the land in controversy. 2. That he entered under said claim or color of title upon said land in controversy or some part thereof. 3. That his entry was hostile and adverse to the party having the legal title and was actual, visible, and exclusive, and 4, Must have so continued hostile, actual, visible, unbroken, under said color or claim of title for (time prescribed by statute) before the commencement of the action to dispossess.[23]

(75) The court instructs the jury that defendant, S., alleges that he went into possession of the tract of land described in the petition of ——— that he is now living on said tract of land, and that ever since going into possession of ——— he has been in open and notorious possession of said land, claiming the same all of the time as his own, and defendant charges that the statute of limitations is a complete bar to the plaintiff's claim; and the court instructs the jury that if they believe from the evidence that the deed from W. to the defendant, S., conveying certain lands and under which deed the defendant S. claims to enter into possession of the lands described in the complaint, conveyed the same lands which are described in the complaint, then

[22] Approved in Kolb v. Jones, 62 S. C. 193.

Held not open to objection that it ignored necessity of adverse holding, as holding under claim of ownership is adverse.

[23] Approved in Maxwell v. Cunningham, 50 W. Va. 298.

it is for the jury to say whether the defendant, S., entered into the possession of the said lands under the said deed, and whether the subsequent possession was adverse, to the exclusion of plaintiff's claim.[24]

Claim of land as street.

(76) The court instructs the jury that if they shall believe from the evidence that the defendant has been in peaceable, quiet, and uninterrupted possession of the land in question for (time prescribed by statute) or more, claiming it as a street under color of title, either by grant, contract or dedication from the owners thereof, and exercising acts of ownership thereover by repairing, filling in, or otherwise, they should find for the defendant.[25]

Distinction between color of title and claim of title.

(77) The court instructs the jury that color of title and claim of title are not in their strict sense synonomous terms. To constitute color of title a paper title,—that is, a deed or other instrument purporting to convey title,—is necessary, but a claim of title may exist wholly in parol, and may be manifested by acts as well as by words, and if you find from the evidence that the defendant S. built a house or houses and barn and other outbuildings, dug a well or wells, planted an orchard and otherwise improved and cultivated the premises in controversy, this is competent evidence tending to show claim of title on part of the defendant upon which an adverse possession may be predicated and which if continued for (the period prescribed by statute) or more would bar the plaintiffs from maintaining this action.[26]

[24] Approved in Sudduth v. Sumeral, 61 S. C. 276.

The court held in this case that whether the land described in a particular deed is the same land described in the complaint or some other papers is a question of fact for the jury.

[25] Buntin v. City of Danville, 93 Va. 200.

[26] Approved in Bartlett v. Secor, 56 Wis. 520.

Conflict between paper title and rights acquired by possession.

(78) The court instructs the jury that the deeds and papers introduced in evidence by the plaintiff in this case are sufficient to vest the legal title to the whole of the land described in the declaration in the plaintiff, and to authorize it to take possession of the whole of that tract of land, unless the defendants have shown an adverse possession to the same or some part thereof, as explained in these instructions for a period of (time prescribed by statute) or more before the commencement of this suit, or some valid legal right to the possession of the premises claimed, or some part thereof, by a preponderance of the evidence.[27]

Source of title.

(79) The court instructs the jury that, as a matter of law, if you believe from the evidence that the land in question in this case is a portion of the south fractional half of section twenty-nine (29), * * * that the source of title to such land is in the state of Illinois, and that in proving title to the land in question it is not necessary for the plaintiff to commence with the United States, or to go further back than the state of Illinois as a starting point in making out its chain of title to said land.[28]

IV. Requisites of Actual Possession.

In general.

(80) The court instructs the jury that for the purpose of constituting adverse possession by a person claiming title not founded upon some written instrument or some judgment or decree, land shall be deemed to have been possessed and occupied in the following cases only: (1) When it has been protected by a substantial inclosure; (2) When it has been usually cultivated and improved.[29]

[27] Approved in Chicago & A. R. Co. v. Keegan, 185 Ill. 70.
[28] Approved in Chicago & A. R. Co. v. Keegan, 185 Ill. 70.
[29] Approved in Bartlett v. Secor, 56 Wis. 520.

(81) The court instructs the jury that, to constitute possession it is not necessary that the land should be enclosed with a fence, or that the same should be cultivated, resided upon or that buildings should be erected thereon. It is sufficient if the acts of ownership are of such a character as to openly and publicly indicate an assumed control or use, such as are consistent with the character of the premises in question. If you find in the spring of ———, or the summer of that year, ——— after getting his deed, began the exercise of such acts of ownership and control as are usual by owners of timber lots when used to supply a farm in the neighborhood with timber, and his acts were of such an adverse, open, notorious and hostile nature as to clearly indicate that he asserted exclusive control over it, and that he continued to do so up to the time of his selling to defendant, and that afterwards, defendant continued with like acts, you would be justified in finding that defendant had been in such possession as to bar any claim of title upon the part of the plaintiff, and your verdict should be for the defendant.[80]

(82) The court instructs the jury that if you believe from the evidence in the case that the land in controversy or any considerable part thereof, was susceptible of a definite occupation or possession, that is, that said land or any part thereof was fit for pasture or cultivation without clearing or cutting away the timber therein—then in order to constitute the possession of plaintiff or that of those under whom he claims, adversely, you must believe from the evidence in the case that the plaintiff or his grantor, either in person or by their tenants built permanent structures on said land or actually inclosed or cultivated said land or some part thereof for the period of (period prescribed by statute) prior to the institution of this suit, and that it is not sufficient in such a case that plaintiff and his grantor paid the taxes on said land,

[80] Approved in Murray v. Hudson, 65 Mich. 670.

kept off trespassers, cut timber, erected temporary structures, and pastured hogs thereon under a claim of ownership.[31]

Sufficiency of entry.

(83) The court instructs the jury that if they believe from the evidence that the grantors of defendant had no title or possession to the premises described in their deed to him of lot No. —, dated ———, and recorded ———, it could not control and ride over the recorded deed of E. to plaintiff, or affect the possession of the plaintiff of the premises in dispute, if his possession was such, under the instructions aforesaid, as would constitute a disseizin of the true owner; that the delivery and registry of the deed to the defendant of lot No. —, would not purge the disseizin of the plaintiff, (if the latter had acquired such a possession as constitutes a disseizin according to the foregoing instructions, or, if the disseizin was constituted by the delivery and recording of the deed of E. to him,) without an entry into some part of the disputed premises. But, if the defendant had the title to the premises in dispute, under the deed to him from ——— and wife, or the right of entry therein, the disseizin might be purged by an entry. And, in regard to an entry, the intent with which it is made, generally determines its character, and consequently, the effect of the act. The mere act of going upon the land and cutting trees upon it, will not always constitute a legal entry sufficient to vest the seizin in him who has the legal right. In order to constitute a legal entry, the party must go upon the premises with that intent.[32]

Cultivation and improvements.

(84) The court instructs the jury that if you believe from the evidence that the defendant, not less than (time prescribed by statute) prior to the commencement of this suit, entered into possession of the lands in controversy and cultivated said lands or fenced the same, or erected improvements

[31] Approved in Cook v. Farrah, 105 Mo. 492.

[32] Approved in Gardner v. Gooch, 48 Me. 487.

of any kind thereon or did any other acts of such a character as to clearly show that he was occupying said lands and claiming the same as his own, and during all of said time continued to so occupy said lands, claiming during all of said time to be the owner of the same, and never during any of said period of ——— abandoned said land, but during all of said time continued openly, notoriously, adversely and exclusively to occupy and claim the same as his land, then you are instructed that said acts on the part of defendant would constitute adverse possession within the meaning of the law and would entitle the defendant to a verdict at your hands. But if the defendant has failed to establish any of said acts by a preponderance of the evidence your verdict should be for the plaintiff.[33]

(85) The court instructs the jury that neither physical occupation, cultivation, nor residence is necessary to constitute actual adverse possession, when the property is so situated as not to admit of any permanent useful improvement, and the continued claim of the property has been evidenced by open, visible, continuous acts of ownership, known to and acquiesced in by the real owner, or so far notorious as to be presumed to be within his knowledge.[34]

(86) The court instructs the jury that there is a use and occupation of land within the law where the land is used for turpentine purposes, and such use is so notorious as to attract the attention of every adverse claimant and so exclusive as to prevent actual occupation by another. If you believe from the evidence that the trees on the land were cultivated for turpentine purposes and the timber was boxed and that for a considerable portion of the time during the year the trees were chipped and hacked and the hands were continually dipping turpentine from the trees and were hauling the turpentine away and the trees were racked around to protect

[33] Approved in Hoffine v. Ewings, 60 Neb. 729.
[34] Approved in Merwin v. Morris, 71 Conn. 555.

them from fire, I charge you that this would be actual possession if you find it to be true.[35]

(87) The court instructs the jury that if the tenants, under their respective leases from ———, occupied and cultivated to the T. line, in such a manner as the owners of such land would ordinarily occupy and cultivate, and such occupation had continued for the period of (time prescribed by statute) it would constitute such an adverse possession as would bar the defendant's right to recover.[36]

(88) The court instructs the jury that, if you believe from the evidence in the case that the land in controversy or any considerable part thereof was susceptible to definite occupation or possession,—that is, that said land or any part thereof was fit for pasture or cultivation without clearing or cutting away the timber thereon—then in order to constitute the possession of plaintiff or that of those under whom he claims adverse as required in the foregoing instruction, you must believe from the evidence in the cause that the plaintiff or his grantor M., either in person or by their tenants, built permanent structures on said land or actually enclosed or cultivated said land or some part thereof for the period of (the period prescribed by statute) prior to the institution of this suit, and that it is not sufficient in such a case that plaintiff and his grantor M. paid the taxes on said land, kept off trespassers, cut timber, erected temporary structures and pastured hogs thereon under a claim of ownership.[37]

Inclosure.

(89) If T. and his representative took the actual possession of the G. tract, by fencing up the whole of it, and held such possession, claiming the tract in fee, for more than (time

[35] Approved in Flannery v. Hightower, 97 Ga. 592.

This instruction was held not to be open to objection of expressing opinion on weight of evidence. See Vol. I, Chap. IV., for discussion of general principle.

[36] Approved in Reed v. Proprietors, etc., 8 How. (U. S.) 274.

[37] Approved in Cook v. Farrah, 105 Mo. 492.

prescribed by statute) prior to the entry of defendants, and those under whom they claim, such possession vested the fee in said T's representatives.[38]

(90) The court instructs the jury that you cannot presume that the owner of the ———, in going along the highway where the fence is shown to be nearly on the line, and seeing a fence extending north, has thereby notice that the fence incloses any portion of his land. On the contrary, he is justified in assuming that his neighbor is only enclosing what he is entitled to.[39]

(91) The court instructs the jury that if the plaintiff's possession of the premises in dispute was open, notorious, exclusive and adverse, comporting with the usual management of a farm by its owner, though a portion was woodland and uncultivated, and though not wholly surrounded by fences, or rendered inaccessible by other obstructions, it would constitute a disseizin of the true owner, unaffected by other facts.[40]

Use of premises for storage purposes.

(92) The court instructs the jury that the mere piling of wood or lumber or rails or offal upon a tract of land or lot, unaccompanied by any other act denoting ownership, is not such possession of the land or lot as would constitute notice to a bona fide purchaser of such tract of land or lot, unless such piling of wood or lumber should constitute, in the estimation of the jury, an open, visible and exclusive possession of the lot in the person piling such wood or lumber.[41]

Cutting grass or fire wood.

(93) The court instructs the jury that an occasional use of the land, such as the occasional cutting of grass or fire wood, will not be sufficient to establish adverse possession.[42]

[38] Approved in Farrar v. Heinrich, 86 Mo. 521.
[39] Approved in Hockmoth v. Des Grand Champs, 71 Mich. 520.
[40] Approved in Gardner v. Gooch, 48 Me. 487.
[41] Truesdale v. Ford, 37 Ill. 210.
[42] Approved in Merwin v. Morris, 71 Conn. 555.

(94) The court instructs the jury that if plaintiff cut the grass upon a natural fresh meadow, and carried the hay away and converted it to his own use, annually for any period of time, however long, without any other possession of the land on which it grew, or any claim of title to the land, such acts alone would not constitute an adverse possession against the true owner of the soil.[43]

Possession by tenant.

(95) The court instructs the jury that the possession of the premises by said lessees, under the lease, was the possession of K., the lessor, and his heirs, he claiming to have a deed which included them, and having turned M. out of possession, if it was of such a character as amounted to a disseisin, it would in law inure to the benefit of K., and his heirs, and would be the disseisin and adverse possession of the lessor.[44]

Payment of taxes.

(96) The court instructs the jury that so far as the claim of plaintiffs, founded upon color of title and payment of taxes for (time prescribed by statute) consecutive years while the land was vacant and unoccupied and possession thereafter taken, is concerned, to establish title on that basis it must appear, from a preponderance of the evidence, that throughout the entire period, from the first to the last of such payment of taxes, the land was vacant and unoccupied.[45]

V. Extent of Possession.

Whether adverse holding limited to actual occupancy.

(97) The court instructs the jury that if the adverse possession should be held as in the above instruction for (time prescribed by statute) before the commencement of the action under claim of title, the person claiming adversely will be

[43] Approved in Gardner v. Gooch, 48 Me. 487.
[44] Approved in Reed v. Proprietors, etc., 8 How. (U. S.) 274.
[45] Approved in Scott v. Bassett, 186 Ill. 98.

limited in the adverse holding to his actual enclosure, if under color of title then the adverse holding will extend to the boundaries contained in the deed or writing that constitutes his color of title.[46]

(98) The court instructs the jury that if they believe from the evidence that plaintiff, upon receiving and recording the deed from E. to him, dated ———, entered upon the land therein described, and continued to have a visible possession, occupancy, and improvement of only a portion thereof, such occupation and improvement, uncontrolled by other facts, were a disseisin of the true owner as to the whole of the land described in the deed, though E. might not have had title thereto.[47]

(99) The court instructs the jury that if the plaintiff's possession of the premises in dispute was open, notorious, exclusive and adverse, comporting with the usual management of a farm by its owner, though a portion was woodland and uncultivated and though not wholly surrounded by fence or rendered inaccessible by other obstructions, it would constitute a disseisin of the true owner unaffected by other facts.[48]

Same—Accretions.

(100) The court instructs the jury that the term accretion as used in the instructions in this case means portions of soil added to that already in possession of the owner by gradual deposit caused by a change in the bed of the river, and that accretion belongs to the owner of the land, and it makes no difference whether the accretions were formed before or after the ownership has accrued, and that ownership may be acquired by adverse possession as well as by deed.[49]

(101) The court instructs the jury that if they believe from the evidence that S. cleared and cultivated the land east of the old levee, beginning at an old stone in the southeast

[46] Approved in Maxwell v. Cunningham, 50 W. Va. 298.
[47] Approved in Gardner v. Gooch, 48 Me. 487.
[48] Approved in Gardner v. Gooch, 48 Me. 487.
[49] Approved in Benne v. Miller, 149 Mo. 228.

corner of the lot No. 7, of the D. tract, and running eastwardly at right angles to said old levee toward the Mississippi river, and that he and those under whom he claims title have been in the open, notorious and adverse possession thereof, claiming title thereto for more than (time prescribed by statute) prior to the institution of this suit, plaintiff is not entitled to recover any part of the land so occupied, nor any part of the accretion thereto.[50]

VI. Duration of Possession in General.

Continuity of possession.

(102) The court instructs the jury that it is not sufficient to constitute the possession referred to in the preceding instruction, that the said K. should have occasionally used such property for the purposes of a printing office during a period of time equal to (time prescribed by statute) or more, but such possession, in order to bind the true owner, must have been continuous and unequivocal.[51]

Possession against persons under disability.

(103) The court instructs the jury that if you believe from the evidence, that the defendant, and those through whom he obtained possession of the property sued for, had had a continuous possession thereof for twenty years next before the commencement of this suit, claiming the same as their own,—then they should find for the defendant as against each of the plaintiffs, who has not proved herself or himself either under twenty-one years of age, or a married woman, at the commencement of such possession; and the burden of proof is upon each of the plaintiffs claiming to have been under such age, or a married woman at the commencement of such possession, to prove it affirmatively; and until it be proved to the satisfaction of the jury, the contrary thereof should be presumed by the jury.[52]

[50] Approved in Benne v. Miller, 149 Mo. 228.
[51] Approved in Mertens v. Kielmann, 79 Mo. 412.
[52] Approved in Dessaunier v. Murphy, 33 Mo. 184.

Tacking possession.

(104) The court instructs the jury that, if you believe, from the preponderance of the evidence, that the grantors of the plaintiff held the open, notorious, adverse, hostile, peaceable, uninterrupted and continuous possession of the land in question for some time, under claim of ownership thereto, and that they conveyed one from another down to the plaintiff herein, and that under said conveyance the plaintiff took possession of the land in question and held the open, notorious, adverse, hostile, peaceable, uninterrupted and continuous possession thereof, under claim of ownership, from the time of such conveyance to the time it is alleged in the declaration that the defendant took possession thereof, and that such possession of the said grantors of the plaintiff and the possession of the plaintiff together amount to a period of (time prescribed by statute) or more prior to the time it is alleged in the declaration that the defendant took possession thereof, then the plaintiff would be the absolute owner of the said land, if you further believe, from the preponderance of the evidence, that the defendant took and unlawfully withheld from the plaintiff the possession thereof as alleged in the declaration, then you should find a verdict for the plaintiff.[53]

(105) The court instructs the jury that to defeat the claim of the plaintiffs in this action upon the defense of adverse possession, the jury must find from the evidence that the defendants, in person or by their tenants, have for more than (time prescribed by statute) prior to the ——— day of ———, 19—, held actual, exclusive, continuous, open, notorious, and adverse possession of the said premises, and they cannot extend their possession by tacking it to the prior possession of any person who, during such prior possession, did not claim any title or right to the premises.[54]

(106) The court instructs the jury that if, as claimed by

[53] Approved in Lourance v. Goodwin, 170 Ill. 390.
[54] Approved in Holtzman v. Douglas, 168 U. S. 278.

the plaintiff here, you shall find that the predecessors of these defendants in the chain of alleged title have admitted the title to be in the predecessors, or any of them, and you so find the title established, then it is not necessary that it appear that any possession has been exercised on the part of the owner.[55]

(107) The court instructs the jury that if the possession of ———, in 19—, under K., included the demanded premises, and the same possession had been continued by the subsequent lessees, as the evidence tended to show it had been, down to the entry of the heirs of M. and wife, in 19—, it constituted in law such a continuity of possession as would bar the demandant's right to recover.[56]

(108) The court instructs the jury that if defendants, and those under whom they claim, have had adverse possession of so much of the premises described in the petition as is covered by the building of defendants, and said possession was open, notorious and hostile, under claim of title, and continuous for more than (time prescribed by statute) prior to the institution of this suit, on the ——— day of ——— 19—, then the plaintiffs cannot recover the portion of said premises so covered by said building.[57]

CHAPTER XI.

AGENCY.

I. The Relation.

What constitutes relation of principal and agent, 109, 110.
Agency with regard to loan—Whether agent for borrower or lender, 111.
Termination of agency, 112-115.

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[55] Approved in Merwin v. Morris, 71 Conn. 555.
[56] Approved in Reed v. Proprietors, etc., 8 How. (U. S.) 274.
[57] Approved in Dalton v. Bank of St. Louis, 54 Mo. 105.

II. Rights and Liabilities of Principal as to Third Persons.
Authority of agent to bind principal, 116.
Authority of real estate agent to make representations as to quantity of land sold, 117-119.
Authority of agent to receive payment of subscriptions, 120.
Implied power of agent, 121.
Implied power to borrow money, 122, 123.
Authority to warrant goods sold, 124.
Power to collect claims, 125.
Unauthorized acts of agent—Apparent authority, 126-134.
Same—Acting upon appearance of authority as essential element of estoppel, 135.
Same—Violation by agent of secret instructions, 136, 137.
Same—Effect of representations by agent as to his authority, 138.
Apparent authority with reference to transfer of principals' property, 139.
Liability of principal for torts of agent, 140.
Liability for fraud of agent, 141.
Ratification, 142-145.
Same—Of fraudulent representations, 146.
Same—Acceptance of benefits, 147-151.
Same—By suing on contract, 152.
Same—Knowledge of facts, 153-155.
Same—Effect of ignorance of immaterial fact, 156.
Same—Of warranty made on sale of goods, 157.
Same—Liability for wrongful acts of agent, 158.
Ratification in part, 159.
Notice to agent, 160-163.
Rights of undisclosed principal as to third persons, 164, 165.
Liability of undisclosed principal to third person, 166, 167.

III. Rights and Liabilities of Agent as to Third Persons.
Liability of agent to third person, 168, 169.
Rights and liabilities of agent where agency is undisclosed, 170

IV. Mutual Rights and Liabilities of Principal and Agent.
Skill and diligence required from agent, 171.
Inability of agent to make profits at expense of principal, 172-174.
Adverse interest, 175, 176.
Ratification of violation of instruction—Knowledge of facts, 177.

I. The Relation.

What constitutes relation of principal and agent.

(109) The court instructs the jury that the matter of ——— being the agent of defendants is a question of fact

for them to determine from the testimony and in aid of their investigation they are instructed that an agent may be created by long acquiescence on the part of the principal, with knowledge of his acts as agent for said principal, as well as by express appointment; and that if by express agreement, it is so arranged between the parties that one shall be advertised as the agent, but that another shall actually do the business, and this third person does transact the business, and becomes known as the agent of the principal by transacting their said business, then the said third person is their agent and the principal is estopped from denying it as to those who have acquired rights against said principal because of the acts of said agent.[1]

(110) The court instructs the jury that direct proof of agency may be dispensed with where the person alleged to be the principal has by his actions or words influenced the conduct of others so that a wrong would be done to those influenced, if the alleged principal should be permitted to show a state of facts inconsistent with his actions and words. And the court instructs the jury that if they believe from the evidence that (plaintiff had bought flour regularly from ——— as the agent of the defendant for several years, and that the contracts made with ——— had always been promptly complied with by the defendant), and if the jury believe from the evidence that (——— acted as agent of defendant for several years in making sales of the class of articles which plaintiff bought, and that his contracts were always carried out by the defendant), then the jury may find that ——— was the agent of the defendant and authorized to sell the goods described in the declaration to the plaintiff, although they may further find that ——— was also a broker selling on commissions.[2]

[1] Planters' Mut. Ins. Co. v. Lyons, Lindenthal & Co., 38 Tex. 253.
[2] Haubelt v. Rea & Page Mill Co., 77 Mo. App. 672.

Agency with regard to loan—Whether agent for borrower or lender.

(111) The court instructs the jury that this action is brought by plaintiff against defendant to enforce the payment of two bonds and a mortgage given to secure the bonds executed by defendant and the defendant sets up the defense of payment. Defendant had entered into contracts with the city of ——— for the building of ——— and under this contract with the city of ——— he was to be paid for his work when the assessments for the work should have been collected by the city, and defendant not having a sufficient amount of money to carry on his undertaking with the city applied to one S. to borrow money for him and a bond and mortgage were executed by the defendant to L., to be turned over to whoever should furnish the money. S. induced plaintiff to furnish the money required by the defendant and the arrangement between the defendant and S. was that the money furnished by the plaintiff should be repaid when S. should collect the assessments, and it seems that the plaintiff did not ask the delivery of the bond and mortgage which had already been drawn up and executed in favor of L., and did not insist on anything more than a general statement that the money furnished by him should be secured by mortgage. The money which was collected by S. on the assessments was not paid to plaintiff and for the purpose of this case the jury will regard such money as having been misappropriated. It was misappropriated at a time when S., was responsible for it. There is some evidence that plaintiff knew of the arrangement between the defendant and S. by which the moneys to be collected on assessments should be applied in payment of the loan made by the plaintiff. Now the court instructs the jury that it is for them to determine whether S. misappropriated the moneys collected upon the assessment as the agent of defendant. If S. misappropriated such moneys as agent of defendant, then your verdict should be in favor of plaintiff, but if the jury find from the evidence that S. mis-

appropriated the moneys collected upon assessments as the agent of plaintiff, then your verdict must be for the defendant.[3]

Termination of agency.

(112) The court instructs the jury that the presumption that a fact once shown to have existed, continues, applies to the relation of principal and agent.[4]

(113) The court instructs the jury that an agent cannot act in the business of his agency for himself and his principal at the same time and in the same transaction, and that if you believe from the evidence (that the plaintiff was employed by the defendant railroad company to purchase wood and ties for the use of the corporation and that the plaintiff accepted a commission from A., who desired to sell wood to the defendant, and that plaintiff advised the directors to make the purchase of A., without disclosing his interest and that under such advice defendant made the purchase at a higher price than it would otherwise have to do, then you are instructed that defendant was justified in discharging the plaintiff).[5]

(114) The court instructs the jury that one who has dealt with an agent of another has a right to assume, if not otherwise informed, that the authority of the agent continues and revocation by the principal of the agent's authority will not affect the person so dealing with the agent unless such person has notice of the revocation, and if the jury believe from the evidence (that the plaintiff sold the [wood] described in the declaration to the defendant, and that under the terms of the contract the [wood] was to be delivered from time to time to the defendant, and that the plaintiff from time to time delivered the [wood] to A., the agent of the defendant, who was authorized to accept the [wood], but that before all the installments of the [wood] had been delivered the agency of

[3] Brecht v. McParland, 187 Pa. St. 620.
[4] Fassin v. Hubbard, 55 N. Y. 465.
[5] Morrison v. Ogdensburg & L. C. R. Co., 52 Barb. 173.

A. was revoked by the defendant, but that plaintiff had no notice of the termination of the agency of A., but continued to deliver the final installments of the [wood] to A. as agent of defendant, then the jury are instructed that the acceptance of the [wood] by A. on behalf of the defendant bound the defendant).[6]

(115) The court instructs the jury that the plaintiffs were employed by J. to work for the defendant mining corporation at a time when J. was the authorized agent of the mining company and that plaintiffs had a right to suppose the same condition of things continued to exist after the employment as existed at the time of the employment, unless they had notice to the contrary, or unless there was something in the circumstances surrounding the matter that was equivalent to notice to them, and when the defendant mining corporation entered into a contract with J., by which the defendant ceased to operate its mine and J. assumed charge of the mine as an independent contractor, then it was the duty of the defendant corporation to the plaintiffs, who were in its employ at the time they made the contract with J., to convey particular notice to the plaintiffs of this change. The rule is that when one has constituted and accredited another as his agent to carry on his business, the authority of the agent to bind his principal continues, even after actual revocation of such authority, unless notice of the revocation is given, and, as to persons who have been accustomed to deal with such an agent, until notice of revocation is brought home to them. When notice is sought to be inferred as a fact from circumstances, it becomes a question for the jury. The court here thinks this is a question of fact and submits it to you, and the question is submitted to you as a matter of fact, whether this labor for which this suit is brought was done and performed under such circumstances as would operate as notice, or under such circumstances that it can be said that notice

[6] McNeilly v. Continental Life Ins. Co., 66 N. Y. 23.

can be inferred on the part of these claimants of this change. If these parties had notice of this change, they cannot recover here, for it is undisputed that a change took place; that the authority of J. was revoked, and he entered into an independent contract; and the question here is, did these claimants have notice, or, under the circumstances surrounding them, can you infer from this evidence legitimately that they received notice? And the question is submitted to you as a matter of fact, whether the defendant gave such notice as a prudent man should have given.[7]

II. Rights and Liabilities of Principal as to Third Persons.

Authority of agent to bind principal.

(116) The court instructs the jury that if they believe from the evidence that the defendant gave authority to A. as his agent to sell the tract described in the declaration if a speedy sale could be effected, and that the plaintiff some two years and a half after the authority was given saw the written instructions which the defendant had given to A. and took legal advice on the effect of such instructions, and if the jury further believe from the evidence that plaintiff had been informed that if he purchased under such power he must run the risk of having his purchase confirmed by the defendant, and that accordingly the plaintiff took a bond of indemnity from A. against loss which might arise out of the purchase, then the authority conferred upon A. by the defendant was not effective to convey any title to the plaintiff.[8]

(117) The court instructs the jury that even if they believe from the evidence that S. did purchase the property for himself and L., yet if the jury believe, from the evidence, that L. did not authorize him to do so, L. is not bound by such purchase. That if the jury find that in the contract and arrangement, which resulted in the giving of the note in suit,

[7] Tousignant v. Shafer Iron Co., 96 Mich. 87.

[8] Peabody v. Hoard, 46 Ill. 242.

the business between L. and ——— was done by S., and that said S. had no authority, as a general agent, from said L., beyond that resulting from their relation as general partners in the manufacture of ———, but only an authority to do that particular business, he (S.) would be, as far as this case is concerned, a special agent of L. in that business, and so far as the jury find that he (S.), in doing it, exceeded the authority and instructions given to him by L., L. would not be bound.[9]

(118) The court instructs the jury that if they believe from the evidence that (A. was the general agent and manager of the defendant, and that A. had authority to execute a contract for the erection of a building in accordance with plans drafted by the architect, and that A. employed the plaintiff to act as architect, and that no person other than A. had authority to employ an architect, then the jury may find that A. had authority on behalf of defendant to employ the plaintiff as architect).[10]

Authority of real estate agent to make representations as to quantity of land sold.

(119) The court instructs the jury that after defendant had put the matter of selling her land in Mr. S.'s hands, he had a conversation with J., the brother of defendant, in which J. suggested the propriety of employing E., who was a real estate broker, to effect the sale. Mr. S. assented readily to J.'s idea and gave him a more general authority, because he said, "Employ two or three brokers, if necessary," and from that time forth he dismissed the same from his mind or at least took no further steps in regard to it, as defendant had, as she declares, dismissed it from her mind. J. then proceeded in the execution of this power to call upon E., and to acquaint him with the situation of the property,

[9] Approved in Lytle v. Boyer, 33 Ohio St. 506.

[10] Lippitt v. St. Louis Dressed Beef & Provision Co., 57 N. Y. Supp. 747, 27 Misc. Rep. 222.

giving him a circular which he had prepared, which contained a minute account of the property, among other things stating in explicit terms that the ground contained seven acres.

One of the questions in this case may be as to J.'s authority to do this much. It is not denied by the defendants, indeed, it is a part of this case or at least of their testimony, that J. was authorized to take whatever steps were necessary or to employ a real estate agent to effect the sale; but it does not necessarily follow that an authority to select a real estate agent to bring about a sale will authorize the agent to take measures to effect such sale. At the same time when a man is employed to do a thing, it is generally implied or may be so, that he is to do what is requisite to render his employment effectual; and without stating any proposition of law (it is a question for the jury to consider whether, if a man is told to select a real estate agent and employ him to sell a piece of property, that does or does not carry with it the duty to give a description of the property to the person so employed), to some extent it would seem to be so, because he must necessarily say where the property is situated, as, for instance, whether it is in the town or in the country. It would not do to call upon a broker and say, "I want you to sell a house," without saying where the house was. Some description therefore must be given and the doubt is as to the extent. I suppose it is a matter of inference or for consideration by the jury, whether a person who is authorized to select a broker and employs him to sell a house, may not state the number of stories, whether it is of brick or of stone, and give him some general idea, because otherwise the broker would be comparatively uninformed of what might be material for him to know in negotiating the sale. I do not say that this would be necessary, because after the broker had been told where the buildings were he might look for himself, but on the other hand I certainly do not mean to tell the jury that a right to give some description of the property might not

exist. J. certainly interpreted his authority in the largest sense.

As I have already said, he gave the broker a minute description of the house containing this more or less material fact, that the ground contained seven acres, and E., putting his interpretation upon the information he had received from G., as coming from a person duly authenticated by the family, proceeded to advertise in the newspapers as a property of seven acres. Under this state of facts, the jury are instructed that it is for them to decide whether S., as defendant's agent so far empowered J., to act for defendant in the sale of the premises in question as to render defendant responsible for the representations of J., to the real estate broker E., and subsequent repetition of such statement by E., to the plaintiff, that the property in question contained seven acres.[11]

Authority of agent to receive payment of subscriptions.

(120) The court instructs the jury that if the jury find from the evidence that ——— was a canvassing agent, obtaining subscriptions for the plaintiff for books published by him and sold by subscription, and that said ——— was restricted by the terms of his employment from collecting for any books or parts of books, except such as were delivered by him,—and they further find that said convassing agent never had possession of the parts and works for which this suit is brought, and did not deliver the same to the defendant,—then the court declares the law to be that the employment of ——— as canvassing agent gave him no authority to collect the money for which this suit is brought, and it devolves upon the defendant to show that he had such authority.[12]

Implied power of agent.

(121) The court instructs the jury that the mere fact that

[11] Griswold v. Gebbie, 126 Pa. St. 353.

[12] Approved in Chambers v. Short, 79 Mo. 204.

an agent is furnished by his principal with funds and instructed to build a house upon lands of the principal with such funds, does not give the agent implied power to build a house upon credit.[13]

Implied power to borrow money.

(122) The court instructs the jury that if you find that C. was an agent of defendants, but that express authority was not given to him, as such agent, to borrow money for defendants, then you may look to the contract between them as it may be shown, by the evidence, the nature and character of the business in which C. was employed to act as agent, and all the transactions between them, and ascertain whether or not it is to be fairly implied as contemplated by them or embraced in the scope of his employment as agreed on between them, that he should have such power to borrow money to be used in such business.[14]

(123) The court instructs the jury that it is not necessary for plaintiff to show any express authority in C. to borrow money to render defendants liable. If money was borrowed by C. in the general course and conduct of the business of defendants, and defendants knew this fact and acquiesced in it, and the note sued on was given for money borrowed of plaintiff, by C., for the business of defendants, and the money was in good faith used in such business, and plaintiff had no knowledge of any want of express authority on C.'s part to borrow money, then you will find for the plaintiff.[15]

Authority to warrant goods sold.

(124) The court instructs the jury that if no express authority is given to a selling agent to warrant goods sold, it will be presumed that only such authority is conferred upon the selling agent as is in conformity to the customs and usages of the trade, in which the principal is engaged, and if

[13] Proctor v. Tows, 115 Ill. 138.
[14] Approved in Collins v. Cooper, 65 Tex. 460.
[15] Approved in Collins v. Cooper, 65 Tex. 460.

you believe from the evidence (that the defendant gave his agent power to sell wool oils as alleged in the declaration, and that the agent did not have express power to warrant goods sold, and if you further believe from the evidence that it was not the usage or custom of the trade or dealers in wool oils to warrant such oils on a sale, then you will find that the defendant's agent had no implied authority to sell with warranty to the plaintiff.)[16]

Power to collect claims.

(125) The court instructs the jury that the wife of an attorney has no implied authority to receive payment of claims put into his hands for collection and if they believe from the evidence that (during the absence of the plaintiff's attorney from home, his wife received and opened a letter addressed to him containing a draft upon defendant payable to his order for collection, and that the defendant paid to the wife of the attorney the draft, and that it did not appear that she had any general or special authority to act for her husband in his business affairs, then the wife of the attorney had no authority to receive payment of the draft, though the jury may believe from the evidence that the attorney had placed some individual claims for collection in the hands of the defendant and instructed him to pay over to her any moneys that should come to the hands of the defendant for the attorney).[17]

Unauthorized acts of agent—Apparent authority.

(126) The court instructs the jury that an agent may bind his principal within the limits of the authority with which he has apparently been clothed in respect to the subject matter of his agency and for the protection of innocent third persons. The authority of an agent is enlarged by implication when the principal permits the agent to do acts not expressly authorized and if through inattention or otherwise, the principal suffers

[16] Wait v. Borne, 7 N. Y. St. Rep. 113, 26 Wkly. Dig. 262.
[17] Day v. Boyd, 53 Tenn. (6 Heisk.) 458.

his agent to act beyond his authority without objection, he is bound to those who are not aware of any want of authority to the same extent as if the requisite power had been directly conferred.[18]

(127) The court instructs the jury that in order to create an agency by representation or estoppel it is essential that the principal should have knowledge of the assumption by the agent of the powers he has exercised.[19]

(128) The court instructs the jury that one who deals with an agent is put upon inquiry as to the extent of the agent's authority, and assumes the risk of the agent having authority to bind his principal in the transaction in which they are engaged; but if the principal has held out the agent as having authority to transact the business, or knowingly permitted the agent to so act, the agent will be conclusively presumed to have the authority, whether it has actually been conferred upon him or not.[20]

(129) The court instructs the jury that the appearance of the authority of an agent to act, which will be sufficient to estop the principal as against third persons, need not arise from transactions had between persons affected by the agent's acts and the principal. The presumption of authority may be inferred from the agent's acts in other transactions.[21]

(130) The court instructs the jury that if they believe from the evidence that (defendant kept a grocery store as alleged in the complaint, and that defendant's son was in and about the store, sold goods, gave orders to traveling salesmen for goods, and ordered goods from other houses in defendant's name, and that the defendant's son did not profess to do business on his own account, and if the jury further believe

[18] Hanover Nat. Bank v. American Dock & Trust Co., 148 N. Y. 612.

[19] First Nat. Bank of Middletown v. Council Bluffs City Water Works, 56 Hun (N. Y.) 412.

[20] Approved in Muth v. St. Louis Trust Co., 94 Mo. App. 94, 4 Bank. Cas. Ann. 416.

[21] Second Nat. Bank v. Pottier Mfg. Co., 18 N. Y. St. Rep. 954.

from the evidence that defendant's son ordered from the plaintiff the (cigars) in question then the jury will be warranted in inferring that the son had authority to bind the defendant by an agreement to purchase the cigars so ordered).[22]

(131) The court instructs the jury that if they believe from the evidence that the defendant held (A) out to the world as his clerk and agent in buying and selling goods for the defendant and that (A) was known as such agent by the plaintiff and that the bill of goods sued for in this case was purchased by (A) from plaintiff and that (A) acted as agent in buying such goods, on account of the defendant, then defendant is legally liable to plaintiff for the goods so purchased, notwithstanding the jury may believe that defendant had given some private instructions to (A) limiting (A's) authority, or notwithstanding the jury may believe from the evidence that (A) appropriated the goods so purchased to his own use.[23]

(132) The court instructs the jury that where an agent is appointed for the sale of lands and his authority is a matter of law and public record, persons dealing with such agent must be presumed to know the extent of the agent's authority in the premises.[24]

(133) The court instructs the jury that in many cases a principal is responsible for his agent's act, if it is within the general scope of the agent's employment, though it is in excess of the agent's authority, but that this is only true as between the principal and third persons when it is necessary to apply the maxim that where one of two innocent persons must suffer a loss because of fraud or the wrongful act of a third, that one must suffer the loss whose negligence made it possible for the loss to occur.[25]

(134) The court instructs the jury that if they believe

[22] Thurber & Co. v. Anderson, 88 Ill. 167.
[23] Doan v. Duncan, 17 Ill. 272.
[24] Dart v. Hercules, 57 Ill. 446.
[25] Clark v. Metropolitan Bank, 10 Super. Ct. (3 Duer) 241.

from the evidence that plaintiffs had in their employ one A as a traveling salesman with power to solicit orders for lumber and to agree on the price and to direct shipment of the lumber so ordered from the yard of plaintiffs and that A had authority from plaintiffs to buy lumber from other dealers on the credit of A for the purpose of filling orders which he might obtain on behalf of plaintiffs, and if the jury further believe from the evidence that after A had been in plaintiffs' employ for a number of years and had made many sales to the defendant he falsely represented that the plaintiffs had authorized him to deal on his own account in such lumber as plaintiffs did not have on hand and that the defendant believed the representations of A and gave him orders which A was to fill on his own account, which A filled in part by causing lumber to be shipped from plaintiffs' yard, and if the jury further believe from the evidence that A concealed this transaction from the plaintiffs and plaintiffs never did or permitted anything which would lead the defendant to suppose that the plaintiffs permitted A to sell lumber on his own account or to corroborate A's statement to that effect, then said act of A of shipping lumber from plaintiffs' yard to fill an order which A pretended to be filling on his own account was not within the apparent scope of A's authority and plaintiffs are entitled to recover from defendant the value of the lumber so sold by A upon his own account, though defendant may have paid A for the lumber.[26]

Same—Acting upon appearance of authority as essential element of estoppel.

(135) The court instructs the jury that apparent authority operates only by way of estoppel and can take the place of real authority only when the person claiming benefits from the exercise of such apparent authority has acted upon the appearance and if the jury believe from the evidence that the (defendant bank took drafts from plaintiff's clerk which

[26] **Sage v. Shephard & Morris Lumber Co., 158 N. Y. 672.**

had been indorsed by the clerk without authority and that the defendant bank had no knowledge of any of the circumstances alleged by the bank to show the apparent authority of plaintiff's clerk to indorse, but simply took the drafts upon the clerk's indorsement, then the defendant bank cannot allege that it was protected by the apparent authority of plaintiff's clerk to indorse the drafts alleged to have been converted by the bank).[27]

Same—Violation by agent of secret instructions.

(136) The court instructs the jury that as a general rule private instructions of the principal limiting the authority of his agent will not affect one who deals with the agent in ignorance of the special instructions and if the jury believe from the evidence that C. borrowed money from plaintiff, claiming to act as agent of defendants, and if such act of borrowing was within the usual and ordinary scope or purview of the business in which C. was employed, and which he was authorized by defendants to conduct and carry on, and plaintiff loaned the money to C. for the benefit of defendants, then defendants would be bound for such money, even if, by the private contract between defendants and C., he was not authorized to borrow money, unless plaintiff knew he was not so authorized when he loaned the money.[28]

(137) The court instructs the jury that if they believe from the evidence that the plaintiffs' fertilizers were first introduced into this community for sale ——— 19—, and further believe that it was the custom or usage of the farmers in this section not to buy any fertilizer, when first introduced, upon the analysis thereof, but to require a warranty that the said fertilizer be as good as any other fertilizer on the market, dollar for dollar, as crop producing, and if they further believe that S. was authorized by plaintiff to sell fertilizer and warranted the fertilizer which he sold to defendant,

[27] People v. Bank of North America, 75 N. Y. 457.

[28] Approved in Collins v. Cooper, 65 Tex. 460.

as alleged in his plea, then they are instructed that the plaintiffs are bound by such warranty, although they may further believe that he was restricted from making such warranty by a contract entered into between the plaintiffs and said S., unless they further find from the evidence that the said written restriction was known to the said defendant at the time he made the said purchase.[29]

Same—Effect of representations by agent as to his authority.

(138) The court instructs the jury that where the principal has clothed his agent with power to do an act, upon its being shown that some extrinsic fact exists which fact must rest necessarily and peculiarly within the knowledge of the agent and of the existence of which fact the execution of the power is itself a representation, a third person dealing with the agent in entire good faith pursuant to the apparent power may rely upon the representations and the principal is estopped from denying its truth to the prejudice of such third person and if the jury believe from the evidence that (defendant carrier through its freight agent issued a bill of lading purporting to be for goods received by the defendant carrier, and that such bill of lading was subsequently transferred to plaintiff in good faith for a valuable consideration and if the jury further believe from the evidence that such bill of lading was issued by the freight agent without in fact having received the goods which the bill of lading represented, then the defendant cannot allege that the freight agent had no power to issue a bill of lading without having received the goods).[30]

Apparent authority with reference to transfer of principal's property.

(139) The court instructs the jury that though a man cannot be deprived of his property without his consent, and

[29] Reese & Co. v. Bates, 94 Va. 321.

[30] Bank of Batavia v. New York, L. E. etc., R. Co., 106 N. Y. 195; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30.

a principal is not bound by the unauthorized act of his agent, yet he is bound by every act on his own part, which gives his agent an apparent authority upon which other persons rely to do the act, the validity of which may be in question—and therefore the inquiry in such cases is, whether the agent's possession of the property, or of the documentary evidence of title thereto, was necessary for the ordinary business of life, or authorized by the custom of trade, or whether the possession and other circumstances of the transaction, were unusual or unnecessary, and of a nature to mislead other persons as to the title to the property.[31]

Liability of principal for torts of agent.

(140) The court instructs the jury that a principal is liable for the torts of his agent committed in the course of his employment, although the principal did not authorize or participate in the tort, and if the jury believe from the evidence that (here state the facts) the defendant sent his servants to load the car described in the declaration, with lumber, and that while in the process of loading the car with lumber, the servants of defendant undertook to move the car, and set the car in motion without making any provision whatever for stopping the car, and if the jury further believe from the evidence that the car so set in motion ran against another car under which plaintiff was for the purpose of making repairs as a servant of the railroad company, and that because of such collision the plaintiff received the injuries sued for in this case, then the jury may find the defendant liable for the injuries to plaintiff.[32]

Liability for fraud of agent.

(141) The court instructs the jury that if defendant employed and authorized R. to sell the ——— and in pursuan of that authority R. sold the ——— and induced the plai

[31] Approved in Burton v. Curyea, 40 Ill. 320.

[32] Noble v. Cunningham, 74 Ill. 51.

tiff to buy, and made false and fraudulent representations about the ———, upon which the plaintiff relied and which induced him to purchase, then the defendant would be responsible for that fraud, notwithstanding there were no instructions given to R. by the defendant which authorized him to make fraudulent representations, and notwithstanding the defendant did not know that he practiced those fraudulent representations. Employing him as agent, or as his agent to do that thing, he became responsible for the methods which his agent adopted in doing that thing. * * * If the representations were false in fact, and R. had no knowledge personally of the truth of these representations, but derived his information from others upon those facts, he, or the person for whom he was acting as agent in the same would be liable to an action for deceit.[33]

Ratification.

(142) The court instructs the jury that if they believe from the evidence that the lot described in the declaration was placed by the plaintiff in the hands of B., as a real estate agent, to sell the same, and that said B. authorized W. to sell the same, and paid him one half of the commission for selling the lot; and if they furthermore believe from the evidence that the sale was in fact thus made, and that the plaintiff, is now seeking to enforce the said sale, then they are instructed that the plaintiff has ratified the acts of said W., and is as responsible therefor, as well as for such representations as the jury believe were made by said W., as he would have been if they had been done and made by himself.[34]

(143) The court instructs the jury that if they believe from the evidence that (it was the duty of A to attend to the payment of rents on behalf of the defendant, and that A in the absence of funds, borrowed the amount necessary from the plaintiff as alleged in the declaration, to pay the rents on

[33] Approved in Haskell v. Starbird, 152 Mass. 117.

[34] Tyson v. Williamson, 96 Va. 636.

behalf of the defendant, and if the jury believe from the evidence that the money so borrowed was disbursed by A in discharge of his duty for the benefit of the defendant and in the payment of rents and that the benefit of the money so borrowed has ever since been retained by the defendant, then defendant is liable to the plaintiff for the money so borrowed).[35]

(144) The court instructs the jury that if they believe from the evidence that (one (A) as alleged in the declaration entered into an agreement with defendant to submit the matters forming the subject of this litigation to arbitration, and that (A) represented that he had authority to so enter into such an agreement on behalf of plaintiff, and if the jury believe from the evidence that (A) had no such authority, yet if they believe that plaintiff was informed of the agreement to submit to arbitration and did not disaffirm, but subsequently brought suit upon the award made by the arbitrators then the agreement to submit must be deemed to have been ratified by the plaintiff).[36]

(145) The court instructs the jury if they believe from the evidence that A assumed to act on behalf of the defendant and induced plaintiff to pay to the defendant moneys as alleged in the declaration for the purchase of an interest in the land described in the declaration, and that A made the false representations alleged in the declaration to induce the payment by plaintiff, and that plaintiff was induced by such false representations to pay over money and if the jury believe from the evidence that defendant received the money so procured from the plaintiff and defendant had knowledge of the representations made by A, then the jury are instructed that the defendant ratified the sale by A and the false representations made by him in regard thereto.[37]

Same—Of fraudulent representations.

(146) The court instructs the jury that if they believe

[35] Hearne v. Keene, 18 Sup. Ct. (5 Bosw.) 579.
[36] Connett v. City of Chicago, 114 Ill. 233.
[37] Leslie v. Wylie, 47 N. Y. 648.

from the evidence that the lot described in the declaration was placed by plaintiff in the hands of B. as his agent, for sale, and that he sold the same to W., and that W. sold it to the defendant without disclosing to defendant he was the owner, but had defendant to execute the note, the foundation of this suit, to plaintiff; and if they further believe that W. made representations to the defendant of material facts as inducements to purchase the said lot, and they believe those representations were in fact untrue, and said representations were reasonably relied upon by defendant to his prejudice, then the jury is authorized to allow the defendant such set-off against the plaintiff's demand as they deem just and proper.[38]

Same—Acceptance of benefits.

(147) The court instructs the jury that if they believe from the evidence that the defendant had full knowledge of all the material facts affecting his rights and liabilities growing out of the agreement sought to be enforced in this suit against him by the plaintiff, and that with such knowledge, the defendant received the benefit of the agreement and that the agreement was made on his behalf by one purporting to be his agent, then the court instructs the jury that defendant is precluded by the acceptance of such benefits from questioning the pretended agent's authority in the transaction.[39]

(148) The court instructs the jury that to hold a principal to a contract made by an agent without authority, on the ground of a ratification by acts of the principal, it must be shown satisfactorily that at the time of the doing of the acts relied on, the principal had full knowledge of what the contract was and intended his acts to relate to the performance of it. Receiving money generally and without knowledge that it is paid upon the contract is no ratification.[40]

[38] Approved in Tyson v. Williamson, 96 Va. 636.

[39] Jones v. Consolidated P. & F. Co., 100 Ill. App. 89.

[40] Trustees, etc., of Town of Easthampton v. Bowman, 136 N. Y. 521.

(149) The court instructs the jury that if C. borrowed money from plaintiff for the benefit of defendants, without authority from defendants, either express or implied, and if defendants, knowing that such money had been borrowed, ratified and acquiesced in the act of C., or knowing such money to be borrowed, accepted the benefit of it, then they would be held bound by the act of C., as much as if they had authorized it before it was done.[41]

(150) The court instructs the jury that if the jury believe from the evidence that plaintiff, authorized C., his agent to rent the house in question to defendant, for but one year, but that said agent rented it for two years, as alleged by the defendant's witnesses and that the defendant held the same for two years and that during the second year of the said tenancy plaintiff treated the defendant as his tenant by receiving the rent originally agreed upon, then the jury may infer that the landlord ratified the contract for the two years lease and may find for the defendant.[42]

(151) The court instructs the jury that if they believe from the evidence that the lot described in the declaration was placed by the plaintiff in the hands of B., as a real estate agent, to sell the same, and that said B. authorized W. to sell the same, and paid him one half of the commission for selling the lot; and if they furthermore believe from the evidence that the sale was in fact thus made, and that W., the plaintiff, is now seeking to enforce the said sale, then they are instructed that the plaintiff has ratified the acts of said W., and is as responsible therefor, as well as for such representations as the jury believe were made by said W., as he would have been if they had been done and made by himself.[43]

Same—By suing on contract.

(152) The court instructs the jury in bringing the action

[41] Approved in Collins v. Cooper, 65 Tex. 460.
[42] Approved in Reynolds v. Davison, 34 Md. 662.
[43] Approved in Tyson v. Williamson, 96 Va. 636.

upon these notes, the G. S. Bank and this plaintiff adopt and ratify all the acts of its agents or officers by which the notes in question came into the bank; that is, when this plaintiff seeks to recover upon these notes from this defendant, it is bound by what the evidence in the case shows to be the facts connected with the transaction.[44]

Same—Knowledge of facts.

(153) The court instructs the jury that if they believe from the evidence that A entered into an agreement on behalf of defendant to purchase the goods described in the declaration from the plaintiff, and if the jury believe from the evidence that A did not have authority to make the purchase on the terms on which he made the purchase, and if defendant was not made acquainted with the facts in the case and did not know of the agreement with the plaintiff, the mere fact that defendant accepted the goods so purchased from A will not warrant the jury in inferring ratification.[45]

(154) The court instructs the jury that where the principal knows that his name has been signed to a certain bond by one assuming to act as his agent, though the principal does not know the exact terms of the bond or the extent of his liability thereon, he can not escape the consequences of his silence by purposely closing his eyes to the means of information within his control regarding the details.[46]

(155) The court instructs the jury that if they believe from the evidence that (defendant directed his agent to get the bonds described in the declaration from plaintiff, who had refused to deliver them up and if the jury believe from the evidence that it was agreed between the agent and the plaintiff to pay the plaintiff a certain sum and to cancel a note upon which the plaintiff was liable if plaintiff would deliver up the bonds; and that thereupon the bonds were de-

[44] Approved in Chicago Title & Trust Co. v. Brady, 165 Mo. 197.
[45] Farwell v. Meyer, 35 Ill. 40.
[46] Lynch v. Smyth, 25 Colo. 103.

posited by the plaintiff in escrow, and if the jury believe further from the evidence that the agent telegraphed to the defendant that the bonds would be turned over to defendant upon the signing of an agreement to be sent to defendant without stating the consideration to be paid to the plaintiff and that the defendant immediately replied directing his agent to secure said bonds, and if the jury further believe from the evidence that plaintiff had an interest in the bonds, then the jury are instructed that defendant ratified the acts of his agent in agreeing to pay the consideration which, it is alleged, he promised to plaintiff).[47]

Same—Effect of ignorance of immaterial fact.

(156) The court instructs the jury that the mere fact that the principal was not informed of an immaterial fact at the time of the alleged ratification, will not defeat it and that if you believe from the evidence (that the plaintiff empowered A, as his agent, to execute a lease of the premises described in the declaration, and that after the execution of the lease plaintiff accepted rent from the lessee and visited the premises and witnessed certain improvements made thereon by the lessee, then you are instructed that the plaintiff cannot allege a departure from the power merely because at the time of the making of the lease, A did not disclose to the plaintiff that the lease was given upon the condition of securing the consent of the plaintiff).[48]

Same—Of warranty made on sale of goods.

(157) The court instructs the jury that when there is a mere special authority to sell particular property of a kind not usually sold with warranty, the buyer who alleges a warranty by the agent of the seller must show that the engagement was one he was empowered to make in behalf of his principal. The receipt of the proceeds of sale in ignorance

[47] Stokes v. Mackay, 46 N. Y. St. Rep. 940.
[48] Clark v. Hyatt, 55 Super. Ct. (23 J. & S.) 98.

of any such undertaking is not an extension of the agent's authority and if the jury believe from the evidence that (A acted on behalf of the defendant as alleged in the declaration and sold the goods described in the declaration to the plaintiff and that defendant ratified the sale, the mere fact of ratification of such sale, if A had no original authority to make it, would not bind the defendant by a warranty made by A, if the jury further find from the evidence that the goods so sold were not of the description usually sold with warranty, and that the defendant had no knowledge of the warranty).[49]

Same—Liability for wrongful acts of agent.

(158) The court instructs the jury that any proposition made by the defendant to the plaintiff, for the purpose of compromising the suit, unless his proposition was accepted by the plaintiff, would not be a ratification of the alleged wrongful act of defendant's agent, for which this suit is brought, and the jury should not take any such proposition of compromise into consideration, unless they believe from the evidence that such proposition was accepted by the plaintiff.[50]

Ratification in part.

(159) The court instructs the jury that a principal cannot affirm an act of his agent in part and disaffirm as to the residue, and the defendant herein is not to be allowed to avail himself of the benefits of M's acts wherein they inure to his benefit and to ignore and disaffirm the acts of said M. when they may operate to his prejudice provided M. has acted within the scope of such agency.[51]

Notice to agent.

(160) The court instructs the jury that notice to an agent is in general notice to the principal, if the agent acquires

[49] Bierman v. City Mills Co., 151 N. Y. 482.
[50] Paulin v. Howser, 63 Ill. 312.
[51] Planters' Mut. Ins. Co. v. Lyons, Lindenthal & Co., 38 Tex. 253.

knowledge of the fact said to be brought home to the principal while acting for the principal in the course of the very transaction which was the subject of the suit.[52]

(161) The court instructs the jury that notice to an agent which would be binding on his principal must be received by the agent while engaged in the business of the principal, or if not so received must be present in his mind at the time of his acting as agent in the transaction to which the notice relates.[53]

(162) The court instructs the jury that if the agent has no legal right to disclose a fact to his principal, the presumption that the agent has communicated all material facts relating to the subject of the agency to the principal will not prevail.[54]

(163) The court instructs the jury that the rule that knowledge of the agent is imputable to his principal applies only so long as the agent acts within the scope of his employment in good faith and in the interest of his principal, but that just as soon as the agent forms a purpose of dealing with his principal's property for his own benefit or advantage or for the benefit and advantage of other persons, who are opposed in interest, he ceases to be an agent acting in good faith for the interest of his principal and his action thereafter based upon such purpose, must be deemed to be in fraud of the rights of his principal and the presumption that he has disclosed all the facts which have come to his knowledge no longer prevails and if the jury believe from the evidence (that A was given authority by the plaintiff to deposit plaintiff's moneys as alleged in the declaration with the defendant and to receive checks of the defendant on behalf of the plaintiff and that A deposited the money to his own

[52] Bank of U. S. v. Davis, 2 Hill (N. Y.) 451; Ingalls v. Morgan, 10 N. Y. (6 Seld.) 178; Henry v. Allen, 151 N. Y. 1.

[53] Constant v. University of Rochester, 111 N. Y. 604, 17 Wkly. Dig. 161.

[54] Henry v. Allen, 151 N. Y. 1.

credit and entered into an agreement with the defendant that the checks should not take effect according to their legal import, the presumption will be that A did not disclose such agreement to the plaintiff).[55]

Rights of undisclosed principal as to third persons.

(164) The court instructs the jury that if they believe from the evidence that servants of plaintiff solicited the defendant as alleged in the declaration for an order for (upholstering) and that the work did not require any special knowledge or skill and if the jury believe from the evidence that defendant did not rely upon the personal services of the said servants of plantiff, then though the fact that said servants were working in the interests of plaintiff was not disclosed at the time of the giving of the order, the plaintiff may recover from the defendant for work done for him in pursuance of the order given by him.[56]

(165) The court instructs the jury that if they believe from the evidence that the contract in suit to furnish materials and render services for defendant was made by A and that A was duly authorized by the plaintiff to make the contract, though A did not disclose the fact of his agency for plaintiff, then plaintiff may enforce such contract against the defendant on the performance of the contract subject to any defenses available against A.[57]

Liability of undisclosed principal to third person.

(166) The court instructs the jury that the liability of an undisclosed principal depends on the agent having acted in the business intrusted to him according to his power and that if the jury believe from the evidence that (the defendant furnished A money with which to make a purchase and that A bought the goods described in the declaration as alleged

[55] Bienenstok v. Ammidown, 155 N. Y. 47; Benedict v. Arnoux, 154 N. Y. 715; Henry v. Allen, 151 N. Y. 1.

[56] Wiehle v. Safford, 27 Misc. Rep. 562.

[57] Van Lien v. Byrnes, 1 Hilt. (N. Y.) 133.

therein from the plaintiff on credit and that plaintiff had no knowledge that A was purchasing for a principal, then the plaintiff cannot recover from the defendant for the goods so sold on credit to A).[58]

(167) The court instructs the jury that if they believe from the evidence that A bought the goods described in the declaration from the plaintiff, and that A used the style of agent in the transaction and that A was in fact acting as agent on behalf of the defendant, though A did not disclose upon whose behalf he was acting at the time of making the contract of purchase, and if the jury believe from the evidence that credit was not given by plaintiff exclusively to A, then plaintiff may elect to hold defendant liable for the goods.[59]

III. Rights and Liabilities of Agent as to Third Persons.

Liability of agent to third person.

(168) The court instructs the jury that if they believe from the evidence that the defendant as alleged in the declaration, claimed to be the agent of (A) and to have authority to make the contract sued on on behalf of A and that the defendant so acting on behalf of A ordered the work, for the value of which this suit is brought, and if the jury believe from the evidence that the defendant was directed by A to order the work on the credit of ——— and not on the credit of A, then the jury will find the defendant liable for the work so ordered.[60]

(169) The court instructs the jury that the liability of one who without authority assumes to act as agent to respond as a principal to the party dealing with him, is founded on his warranty as to his agency and cannot be extended to a case where the limits of his agency or the fact that he is not

[58] Laing v. Butler, 37 Hun (N. Y.) 144; Id., 108 N. Y. 637.

[59] Meeker v. Claghorn, 44 N. Y. 349; Fish v. Wood, 4 E. D. Smith (N. Y.) 327; Kayton v. Barnett, 116 N. Y. 625.

[60] New York Bank Note Co. v. McKeige, 31 App. Div. 188.

an agent is known to the party with whom he deals, nor to a case where the agent is induced to enter into a contract on the suggestion of the party with whom he deals that the alleged principal approves the transaction.[61]

Rights and liabilities of agent where agency is undisclosed.

(170) The court instructs the jury that the general rule is that one who acts as agent for another in order to release himself from liability should disclose his principal because otherwise it will be presumed that he intended to bind himself personally. It is not the duty of one dealing with an agent to find out whether he is acting in the transaction in the capacity of agent, or whether he is acting as principal, but the duty devolves upon the agent, if he desires to relieve himself of personal liability, to disclose the name of his principal in the transaction and if the jury believe from the evidence that the defendant (contracted with the plaintiff as real estate broker as alleged in the declaration to procure a purchaser for the real estate described in the declaration, and the defendant did not disclose the fact that he was acting as agent until the time of the execution of the contract of sale, then the defendant will be individually liable for the commissions of the plaintiff).[62]

IV. Mutual Rights and Liabilities of Principal and Agent.

Skill and diligence required from agent.

(171) The court instructs the jury that the agent's omission to exercise skill and diligence in the performance of a duty undertaken for his principal renders him liable for resultant damage, even if he acted in good faith, and if the jury believe from the evidence (that the defendant in pursuance of his agency loaned plaintiff's moneys as alleged in the declaration on securities which proved to be forged and that the defendant made no inquiries of the company which pur-

61 Aspinwall v. Torrence, 1 Lans. (N. Y.) 381; Id., 57 N. Y. 331.
62 Whiting v. Saunders, 23 Misc. Rep. (N. Y.) 332.

ported to issue the securities as to their genuineness, but relied solely on the standing of the firm to which he loaned the moneys of plaintiff, then the jury may find the defendant guilty of negligence in loaning plaintiff's moneys on such forged securities and charge him with the amount of the loan, if the jury further find from the evidence that the loan was lost by reason of the worthless securities.)[63]

Inability of agent to make profits at expense of principal.

(172) The court instructs the jury that if an agent makes any profits in the transactions growing out of his agency, by any concealed management in either buying or selling, or other transaction on account of his principal, the profits will belong exclusively to the principal.[64]

(173) The court instructs the jury that if they believe from the evidence that the defendant received and accepted a power of attorney from the plaintiff to make a purchase of the land described in the declaration, then plaintiff became entitled to all of the skill, ability and industry which defendant possessed and could bring to bear in making an advantageous purchase on behalf of plaintiff, and that plaintiff was entitled to have the property at the price at which upon the exercise of such skill, ability and industry defendant purchased it from the owner.[65]

(174) The court instructs the jury that if they believe from the evidence that defendant received a power of attorney from the plaintiff to purchase the land described in the declaration, and that defendant made a contract with R to purchase such land (at $12 per acre), and if the jury believe from the evidence that the defendant charged the plaintiff ($15 per acre) for the land which he had so purchased and received the money from the plaintiff, and if the jury further believe from the evidence that the defendant acted as agent

[63] Isham v. Post, 71 Hun (N. Y.) 184.
[64] Cottom v. Holliday, 59 Ill. 176.
[65] Cottom v. Holliday, 59 Ill. 176.

for R in the sale of the land, as well as agent for the plaintiff in the purchase, still the plaintiff will be entitled to recover for the difference between the price at which the defendant actually purchased the land and the price which he charged to the plaintiff if the jury believe from the evidence that defendant demanded and received from the plaintiff more than the actual purchase price of the land.[66]

Adverse interest.

(175) The court instructs the jury that an agent, in the ordinary acceptance of the term, cannot be the agent of two parties, having adverse interests, without the consent of both; because when he is entrusted with a discretion in buying and selling, he must exercise that discretion and judgment for the benefit of the person employing him. But where he is not invested with a discretion by one of the parties, but his instructions are fixed and determined by the one, he may then, without any violation of his duties, receive an employment from the other party having adverse interests, and negotiate the affair between the parties to a conclusion; because, as to one of them, he cannot change the terms of the proposal, and, therefore, he may act for another, in accepting the terms so fixed and determined. In such a case, his engagement is in a manner two-fold, and in this capacity he may bring about the sale or exchange desired by both parties, and claim a compensation from each.[67]

(176) The court instructs the jury that if you shall find from the evidence, that J., plaintiff, agreed with the defendants, that they should take and sell for plaintiff certain of the lots, then being offered for sale by plaintiff, for a certain and definite price fixed and agreed upon by and between the defendants and said J., plaintiff, for which the defendants were to take and receive an agreed commission, viz.,

[66] Cottom v. Holliday, 59 Ill. 176.

[67] Approved in Alexander v. Northwestern Christian University, 57 Ind. 466.

on the purchase price, and that defendants have sold said lots for the agreed price, and have fully accounted to plaintiff for the proceeds received therefor, less the stipulated commission, then they are not liable to plaintiff in this action although they may have received from the purchasers of said lots a sum for conducting the negotiations, receiving and paying out the notes and money, and superintending the transactions, and receiving the deeds and other papers for them.[68]

Ratification of violation of instruction—Knowledge of facts.

(177) The court instructs the jury that if they believe from the evidence that the plaintiff sent the bill of lading described in the declaration to the defendant bank to be delivered to A on the payment by A of a sight draft and the acceptance of a time draft and that defendant bank surrendered the bill of lading solely on the payment of the sight draft and because A claimed that the goods which he had purchased from plaintiff were not as they were warranted, with the understanding that the amount of the balance due to the plaintiff was to be not the amount evidenced by the time draft but such amount as might be determined between the parties to the sale in the future, and if the jury further believe from the evidence that plaintiff accepted the proceeds of the sight draft from defendant bank with knowledge that A had refused to accept the time draft, and that the bill of lading had been delivered, but if the jury further believe from the evidence that plaintiff knew nothing about the agreement that the balance due from A should be ascertained by future adjustment, then the jury will not be warranted in inferring a ratification by the plaintiff of the act of defendant bank in surrendering the bill of lading without securing the acceptance of the time draft.[69]

[68] Approved in Alexander v. Northwestern Christian University, 57 Ind. 466.

[69] Oxford Lake Line v. First Nat. Bank, 40 Fla. 349.

CHAPTER XII.

ALTERATION OF INSTRUMENTS.

Date of note, 178.
Consideration of instrument, 179.
Mode of payment, 180.
Signatures and indorsements, 181.
Provisions as to interest, 182-186.
Attachment of seal, 187-189.
Ratification of waiver of alteration, 190, 191.
Same—Extension of time, 192.
Alterations made by mistake, 193.
Whether alteration made is such as to excite suspicion and provoke inquiry, 194.
Burden of proof to explain alterations, 195, 196.

Date of note.

(178) The court instructs the jury that if you find from the evidence that the plaintiff (state the particular in which the alteration consisted, as changed the date of the note from Dec. 1, 1892, to Jan. 1, 1893) and if you find from the evidence that the defendant did not consent to the making of such alteration then your verdict will be for the defendant.[1]

Consideration of instrument.

(179) The court instructs the jury that a change in the consideration of an instrument is a material alteration and if you believe from the evidence that (here state facts of change as to consideration of instruments, as where a woman executes a bond and mortgage and entrusts them to her husband for delivery, and he before delivery alters the bond by raising the amount and the mortgage by raising the consideration without her consent or subsequent ratification) there is a material alteration, and your verdict will be for the defendant.[2]

[1] First Nat. Bank v. Payne, 19 Ky. Law Rep. 839.
[2] Cheek v. Nall, 112 N. C. 370.

Mode of payment.

(180) The court instructs the jury that an alteration as to the mode of payment is a material alteration and that if you believe from the evidence (here state facts, as striking out the words "in gold or its equivalent" from a promissory note, in the clause for the payment of interest), and you believe from the evidence that the alteration was made without consent of the surety thereon, your verdict will be for defendant.[3]

Signatures and indorsements.

(181) The court instructs the jury that an alteration to be material so as to invalidate the instrument must change the effect of the instrument and though you may believe from the evidence that the alteration consisted in adding words of description to the name of the payee, that fact will not invalidate the instrument as the effect of the instrument is not thereby changed.[4]

Provisions as to interest.

(182) The court instructs the jury that an alteration as to the amount of a note is a material alteration and that if you believe from the evidence (here state the facts, as the addition of the words "with interest" or the insertion of the words "with interest after six months" in a note without maker's consent) then your verdict will be for the defendant.[5]

(183) The court instructs the jury that if you find from the evidence that (here state the facts, as that the time when the interest should commence to run is changed "from maturity" to "from date") then your verdict will be for the defendant.[6]

[3] Church v. Howard, 17 Hun (N. Y.) 5.

[4] Casto v. Evinger, 17 Ind. App. 298.

[5] Meyer v. Huneke, 55 N. Y. 412; Schwarz v. Oppold, 74 N. Y. 304; Kennedy v. Crandall, 3 Lans. (N. Y.) 1.

[6] Sheeley v. Sampson, 5 Kan. App. 465.

(184) The court instructs the jury that it is claimed by B., defendant, that, after he signed a note similar in all respects to the one sued on, excepting that the written words, "with interest at ten per cent." were not then in the note, and since he signed the note, without his knowledge or consent, the said printed words were stricken out, and the said written words inserted. If such an alteration of the note was made by any holder of the note, or made with the knowledge of any holder of the note, without the knowledge of B., it would be a material alteration, and would release him from all liability on the note, and if the defendant B. proves this, by a fair preponderance of the evidence, the verdict must be in his favor; and it would make no difference whether A., the plaintiff, was or was not the owner of the note at the time of the alteration, if he made the alteration after B. signed it.[7]

(185) The court instructs the jury that if they believe from the evidence in the cause, that the promissory note, dated ——— day of ———, 18—, read and shown to the jury in this case, was made by the defendant, M., and indorsed by the defendant A., and delivered by him to his co-defendant, M., for the purpose of enabling M., the maker, to raise money thereon for his own use; and if they shall further believe from the evidence that, after the defendant A. had so indorsed and delivered said note to said M., the words and figures "with interest at ten per cent. per annum after maturity," now appearing in said note, were written therein without the knowledge, consent or authority of the defendant A., by said M., or by any agent or clerk of his, whether done in the presence of any officer or agent of plaintiff, or not, and whether with or without the knowledge of the plaintiff,—the verdict should be for the defendant A. on the second count.[8]

[7] Approved in Brooks v. Allen, 62 Ind. 405.

[8] Approved in Capital Bank v. Armstrong, 62 Mo. 59.

(186) The court instructs the jury that if they believe from the evidence in this case, that the promissory note dated ——— day of ———, 18—, read and shown to the jury in this case, was made by the defendant M., and indorsed by the defendant A., and delivered by him to his co-defendant M., for the purpose of enabling the maker to raise money thereon for his own use; and if they shall further believe that after the defendant A., had so indorsed and delivered said note to said M., the words and figures "with interest at ten per cent per annum after maturity" now appearing in said note, were written therein, and without the knowledge, consent or authority of the defendant A., by said M., or by any agent or clerk of his, whether done in the presence of any officer or agent of the plaintiff or not, whether with or without the knowledge of the plaintiff,—the verdict of the jury should be for the defendant A., on the first count.[9]

Attachment of seal.

(187) The court instructs the jury that if they believe, from the evidence, that the seal was attached to the note in question before the commencement of this case by the plaintiff, without the knowledge or consent of the defendant, then the defendant is entitled to a verdict, and the jury should find accordingly.[10]

(188) The court instructs the jury that if they believe, from the evidence, that the seal to the note in question was attached thereto at the time of the commencement of this case and the execution of the same, then the jury should find for the defendant.[11]

(189) The court instructs the jury that if they believe, from the evidence, that the seal was appended to the note in question after its execution, and before the commencement

[9] Approved in Capital Bank v. Armstrong, 62 Mo. 59.
[10] Approved in Schwarz v. Herrenkind, 26 Ill. 209.
[11] Approved in Schwarz v. Herrenkind, 26 Ill. 209.

of this suit, by and with the consent of the parties thereunto, then the plaintiff is not entitled to recover, and the jury should find for the defendant.[12]

Ratification or waiver of alteration.

(190) The court instructs the jury that if you believe from the evidence that one of the makers of the (here describe instrument, as note) distinctly and unconditionally promised to pay it, there is such a ratification of the alteration that it then becomes immaterial whether the alteration was a material alteration, as by such act he adopts the (instrument, as note) as his own and is bound to pay it.[13]

(191) The court instructs the jury that if you believe from the evidence that the erasure in this case was of an unauthorized indorsement on the note, and you further believe from the evidence that the maker of the note had knowledge of the lack of authority, you are instructed that such alteration would not be a material alteration invalidating the note.[14]

Same—Extension of time.

(192) The court instructs the jury that if you believe from the evidence that the obligors (in a bond), with knowledge that it had been altered by the insertion of a place of payment, offered to pay a part thereof and asked for time in which to pay the balance, such offer and request will constitute a ratification of an assent to the alteration.[15]

Alterations made by mistake.

(193) The court instructs the jury that if you find from the evidence that the alteration (here insert facts, as the writing of the word "paid" where there was in fact no payment) was a mistake, and you further believe from the evi-

[12] Approved in Schwarz v. Herrenkind, 26 Ill. 209.
[13] Goodspeed v. Cutler, 75 Ill. 534.
[14] Waldorf v. Simpson, 15 App. Div. (N. Y.) 297.
[15] Dickson v. Bamberger, 107 Ala. 293.

dence that the alteration was made without fraud the maker will not be discharged from his liability.[16]

Whether alteration made is such as to excite suspicion and provoke inquiry.

(194) The court instructs the jury that although you may believe from the evidence that the note at the time it was executed by the defendant had the words "after the sale of fourteen mills," and although you may believe from the evidence that said words had been erased, yet, if you further believe from the evidence that those words were put upon the paper with such light material that they could be erased without leaving any trace upon the paper which could be detected by a prudent and careful man; and if you further believe from the evidence that said words were erased from the paper without leaving any traces behind them to show that they had ever been upon the paper, and that said erasure was made without the knowledge of the plaintiff and before he purchased the same,—then the law is for the plaintiff, and you should so find.[17]

Burden of proof to explain alterations.

(195) The court instructs the jury that the law imposes upon the party offering a paper in evidence the explanation of any alterations which may appear therein, and therefore if the jury believe, from the evidence, that any alteration has been made in the note in question, the burden of proof is upon the plaintiff to explain the same, and unless the jury believe, from the evidence, that such alteration has been explained by the plaintiff, the presumption of the law is that it was made by the plaintiff, and the jury should find for the defendant.[18]

(196) The court instructs the jury that the burden of

[16] Louremore v. Berry, 19 Ala. 130; Russel v. Longmoor, 29 Neb. 209.

[17] Approved in Harvey v. Smith, 55 Ill. 225.

[18] Approved in Schwarz v. Herrenkind, 26 Ill. 209.

proof is upon the plaintiff in this case, and unless the jury are satisfied, from the evidence, that the seal in question was added to the note since its execution, without the knowledge and consent of the parties thereunto, then they should find for the defendant.[19]

CHAPTER XIII.

ANIMALS.

Trespassing animals, 197.
Same—Sufficiency of fence, 198, 199.
Right to shoot animals destroying crops, 200, 201.
Duty of owner of lands to use diligence to prevent injuries by trespassing animals, 202-204.
Communication of contagious disease, 205-208.
Injuries to other animals, 209.
Animals running at large within corporate limits of town, 210, 211.
Cruelty to animals, 212, 213.
Ownership of dog causing injury, 214.
Knowledge of vicious propensity of animal, 215-222.
Same—General reputation to prove propensity, 223.
Same—Opinion evidence as to propensity, 224.
Sufficiency of restraint of vicious animal, 225.
Provocation of animal causing injury, 226.
Burden of proof of negligence, 227.

Trespassing animals.

(197) The court instructs the jury that if you believe from the evidence that the land was the property of plaintiff, and you believe from the evidence the land was fenced and the defendant broke it down and thereby allowed his cattle to go upon the land, or if you believe from the evidence that the land was fenced and the fence had been broken down without defendant's fault, and he drove his cattle upon the land, the plaintiff will be entitled to recover.[1]

[19] Approved in Schwarz v. Herrenkind, 26 Ill. 209.

[1] Approved in Erbes v. Wehmeyer, 69 Iowa, 85.

Same—Sufficiency of fence.

(198) The court instructs the jury that the plaintiff claims that his crop was destroyed by defendant's cattle. It is important that you determine whether the crop was destroyed by defendant's cattle; whether plaintiff's fence was a lawful fence, four and a half feet high, with spaces sufficiently close; was the fence four and a half feet high, and such as is generally, in this country, recognized as a good fence? This is a matter entirely in your discretion. You will then inquire whether defendant's cattle broke into plaintiff's field and destroyed his crop; and if you find that the fence was such a one as comes within the meaning of the law, and such a one as is recognized as a good common fence in the country, and the defendant's cattle broke through the inclosure, the defendant is liable for all damages resulting from such breach. In such case, it was the duty of the defendant to keep his cattle up, and not suffer them to run at large to the danger of his neighbor's property; and if property was destroyed, he would be responsible. No man has the right to suffer to run at large, animals of a dangerous kind, either to the person or property of another; and if he does, he is responsible for all damages which result from the acts of such animals. But if the fence was not a reasonable one, such as would be calculated to protect the property, the crop, and the loss was the consequence of the negligence of plaintiff, and that by ordinary care and prudence he could have protected the crops, it was his duty to do so; and if he failed to do so, and the fence was such as the custom of the country and the law would not recognize as a lawful fence, he would not be entitled to recover; the loss would be a consequence of his own negligence and fault.[2]

(199) The court instructs the jury that if you find from

[2] Approved in McManus v. Finan, 4 Iowa, 283.

the evidence, that the fence, over which the stock of the defendant entered on the lands of the plaintiff, was a partition fence, dividing the lands of the parties to this suit, and that the stock of the defendant crossed over such fence at a place where it was the duty of the plaintiff to maintain such fence, then defendant would not be liable in this case, unless the plaintiff has shown by the testimony of skillful men that the fence was such as good husbandmen generally keep.[3]

Right to shoot animals destroying crops.

(200) The court instructs the jury that if they believe from the evidence, that the relative value of the plaintiff's dogs and the portion of defendant's growing wheat which was being destroyed by said dogs, if the evidence shows that any wheat was being destroyed, was not disproportionate, and that the defendant to protect his property from such destruction, necessarily exercised the right to defend his property in a reasonable manner, all the circumstances surrounding the transaction being considered, then the jury will find for the defendant.[4]

(201) The court instructs the jury that the defendant had the right to use such means as were necessary for the purpose of putting the dogs out of his field, and if in so doing it resulted in the mutilation of the animal in question it would not be a violation of law, and if the jury believe, from the evidence, that the defendant used such means as a reasonable man would use, all the circumstances considered, to exclude the dogs from his field and from his wheat, and did no more harm to the dog than was necessary, under all the circumstances proved in the case, then the jury will find for the defendant.[5]

[3] Approved in Hinshaw v. Gilpin, 64 Ind. 116.
[4] Approved in Lipe v. Blackwelder, 25 Ill. App. 119.
[5] Approved in Lipe v. Blackwelder, 25 Ill. App. 119.

Duty of owner of lands to use diligence to prevent injuries by trespassing animals.

(202) The court instructs the jury that a man has no right to carelessly look on at the destruction of his property. It is his duty to use reasonable care to prevent such destruction; and if he fails to use ordinary care, he cannot recover for the injury which by ordinary care he might have prevented.[6]

(203) The court instructs the jury that if you find that the plaintiff could, by the use of ordinary care, have prevented the horses and cattle from eating and destroying his hay and corn, he cannot recover for such hay and corn thus destroyed, which by ordinary diligence he might have prevented. The plaintiff, after he knew the horses and cattle of others were destroying his hay and corn, should have used reasonable caution to have prevented further injury, such as fencing his stacks, and fencing his corn beyond the reach of such stock, provided he could reasonably have done so.[7]

(204) The court instructs the jury that if you find from the evidence that the defendant's fence, with the exception of one or two small gaps, was sufficient to have turned the stock, and find that the plaintiff knew of these gaps, and that the stock would come through such gaps, and after knowing such facts, and knowing that the stock did come through said gaps, and if you find that plaintiff, with the exercise of ordinary care, could have prevented said stock from thus trespassing, and did not do so, he cannot recover for the damage which he might have thus prevented.[8]

Communication of contagious disease.

(205) The court instructs the jury that in order that plaintiff may recover in this case, the jury must believe

[6] Approved in Little v. McGuire, 38 Iowa, 560.
[7] Approved in Little v. McGuire, 38 Iowa, 560.
[8] Approved in Little v. McGuire, 38 Iowa, 560.

from the evidence that the defendant's (sheep) not only might, but actually did, communicate the disease in question to plaintiff's sheep, and if the preponderance of the evidence fails to establish such facts or the evidence shows that it is probable that plaintiff's sheep became elsewhere infected, or that it was as likely they caught the disease elsewhere as from the defendant's sheep, then the jury should find the defendant not guilty.[9]

(206) The court instructs the jury that if they believe from the evidence that the defendants imported Texas cattle into ———— and that said cattle so imported and belonging to defendants passed over the pasture where the plaintiff's cattle were grazing, and that the Texas cattle so imported by defendants and belonging to them imparted the infectious disease described in the declaration to the plaintiff's cattle and that plaintiff's cattle died of such disease, and if the jury believe from the evidence that said cattle of defendants had power to impart the disease of which plaintiff's cattle are alleged to have died, then the jury shall find defendants guilty.[10]

(207) The court instructs the jury that, if you believe from the evidence that the defendant, A., brought or caused to be brought into ——— county, State of ———, Texas cattle, or cattle liable to communicate Texas, Spanish or splenic fever to the domestic cattle of this state, and that said cattle came from the country south of this state between the first day of March, 1884, and the first day of November, 1884, and that defendant knew or had reason to know or could by ordinary diligence have known that said cattle were diseased cattle, or were cattle liable to communicate Texas, Spanish or splenic fever to the domestic cattle of this state; or if the defendant knew or could with ordinary diligence have known that such cattle were diseased

[9] Herrick v. Gary, 83 Ill. 85.
[10] Newkirk v. Milk, 62 Ill. 172.

with such disease and were liable to communicate it to the domestic cattle of this state, and such cattle so brought or caused to be brought into said ——— county, communicated such disease to the domestic cattle of the plaintiff, and thereby plaintiff's cattle died, you will find for the plaintiff and the value of such cattle as she lost as shown by the evidence.[11]

(208) The court instructs the jury that, if you find from the evidence that the defendant, A., purchased the cattle described in the petition in good faith in ——— in this state without any knowledge that said cattle were infected with Texas, Spanish or splenic fever and that he had no reason to believe that such cattle could or would communicate to cattle of this state, Texas, Spanish or splenic fever, and that he did not know or have reason to believe or know that such cattle would or could communicate the Texas, Spanish or splenic fever to the cattle of this state, until they arrived at ———, and that the sheriff immediately seized such cattle by virtue of a process issued by W., a justice of the peace, and before the plaintiff's cattle had been exposed and were by the sheriff placed in quarantine, and the defendant A. was deprived of any control over said cattle, and that during the time the said cattle were quarantined by the sheriff, and the defendant deprived of the control of said cattle, the plaintiff's cattle took such disease by going upon said quarantined ground either while defendant's cattle were there in the custody of the sheriff or his deputy or after they were removed therefrom, then the plaintiff cannot recover in the action.[12]

[11] Approved in Pattee v. Adams, 37 Kan. 133.
(Question is whether under the statute defendant must be shown to have knowledge).

[12] Approved in Pattee v. Adams, 37 Kan. 133.
(Question is whether under statute defendant must be shown to have knowledge.)

Injuries to other animals.

(209) The court instructs the jury that plaintiff is not prevented from recovering for the loss of his horse bitten by defendant's dog by reason of the fact that the horse injured was harnessed to a wagon and was being led tied behind another wagon, as plaintiff had the right to lead the horse in that manner, and the fact that he was so leading him was not evidence of negligence.[13]

Animals running at large within corporate limits of town.

(210) The court instructs the jury that before the jury can find the defendant guilty, they must believe, from the evidence: 1st—That defendant's hogs were running at large within the corporate limits of the town of ———; and 2d—That said hogs were so running at large within the corporate limits of said town by sufferance of the defendant. Although the jury may believe, from the evidence, that the defendant's hogs strayed from their usual place of running, into and within the corporate limits of the town of ———, yet, if the jury further believe from the evidence that they were so running within the corporate limits of the said town of ——— without the knowledge or sufferance of defendant, they will find the defendant not guilty.[14]

(211) The court instructs the jury that if they believe, from the evidence, that the defendant, ———, suffered his hogs to run at large outside of the corporate limits of the town of ———, with the expectation that they would run at large within the corporate limits of the town of ———, and they came within the limits of said corporation by reason of their being so permitted to run at large outside of the limits of said town, that then the defendant has suffered the said hogs to run at large in said town, within the

[13] Loulester v. Parsons, 151 Mass. 182.

[14] Approved in Town of Collinsville v. Scanland, 58 Ill. 221.

meaning of said ordinance, and they must find him guilty and assess a penalty within the provisions of the ordinance.[15]

Cruelty to animals.

(212) The court instructs the jury that the Commonwealth must prove that the defendant overdrove the horse knowingly, and intentionally; that the defendant, like all other men, was presumed to know what he did, and to intend the natural and necessary results of his acts; that if, in the proper exercise of his own judgment, he thought he was not overdriving the horse, he must be acquitted; and that upon these instructions the jury might come to the conclusion that it was a question of fact to be determined by the result of the testimony introduced by the Commonwealth and by the defense.[16]

(213) The court instructs the jury that if you believe from the evidence that defendant killed the hogs while they were depredating on his crops and to protect them from destruction and not out of a spirit of cruelty to the animals you will find him not guilty.[17]

Ownership of dog causing injury.

(214) The court instructs the jury that if the defendant had the dog in his possession, and was harboring him on his premises as owners usually harbor their dogs, then he is the owner within the meaning of the law. If the dog was only casually upon his premises, and was not being harbored by defendant as owners usually harbor their dogs, then he was not the owner. In determining how this was at the time of the alleged attack, you will consider the defendant's former treatment of the dog, his declarations concerning him, and the habit of the dog as to staying at the defendant's place.[18]

Knowledge of vicious propensity of animal.

(215) The court instructs the jury that the plaintiff has

[15] Approved in Town of Collinsville v. Scanland, 58 Ill. 221.
[16] Approved in Com. v. Wood, 111 Mass. 408.
[17] Approved in Stephens v. State, 65 Miss. 329.
[18] Approved in O'Hara v. Miller, 64 Iowa, 462.

alleged in each paragraph of his complaint that the steer in question was of a dangerous and vicious disposition, in the habit of attacking mankind and animals. He has also alleged that the defendant knew of such dangerous and vicious disposition of said steer and that he, the plaintiff, had no knowledge of such dangerous and vicious disposition. To entitle the plaintiff to recover he must have proved by a fair preponderance of the evidence not only that the steer was dangerous and vicious, but that the defendant knew that fact and the plaintiff was ignorant of it.[19]

(216) The court instructs the jury that though you may believe that the animal was not actually vicious up to the time of the injury and that ——— had no knowledge of any viciousness in the bull, yet in view of the known and ordinary propensities of such an animal if you believe from the evidence that the manner of driving and managing the bull was negligent, then plaintiff is entitled to recover, if you believe from the evidence her conduct on the occasion was not wanting in reasonable care and prudence in view of all the circumstances and surroundings of the injury.[20]

(217) The court instructs the jury that one who keeps a dangerous dog, with knowledge of its vicious propensities, incurs a liability for any injury caused by it to another person.[21]

(218) The court instructs the jury that if you believe from the evidence that the owner of the horse had knowledge of one vicious act of the animal showing it to be dangerous, he is liable thereafter if he fails to properly secure the animal, and injury to another person results from failure to restrain.[22]

(219) The court instructs the jury that before the plaintiff can recover anything in this suit, he must establish by

[19] Approved in Todd v. Danner, 17 Ind. App. 368.
[20] Approved in Barnum v. Terpening, 75 Mich. 557.
[21] Approved in Triolo v. Foster (Tex. Civ. App.) 57 S. W. 698.
[22] Cockerham v. Nixon, 33 N. C. 269.

a preponderance of the testimony that the defendant owned the dog that did the injury to plaintiff; that said dog was of a ferocious, vicious, and dangerous disposition; and that defendant knew that said dog was dangerous as aforesaid. But, after the owner of a vicious dog has notice of its vicious propensities, he cannot exonerate himself by showing that he used care in keeping and restraining the animal, for after such knowledge he assumes the risk of keeping him securely.[23]

(220) The court instructs the jury that it is not absolutely necessary that an owner should have actual knowledge that the animal has injured others in a similar way in order to make him liable for the injuries, it is sufficient if the owner of the animal has seen or heard enough to convince a man of ordinary prudence of its inclination to commit injuries of the class complained of by plaintiff.[24]

(221) The court instructs the jury that if the defendant's horse was at the time, trespassing in plaintiff's field, on plaintiff's land, or on the land of a third party where plaintiff was pasturing his horse by the month, for a consideration paid by plaintiff to such owner, and there attacked and killed plaintiff's horse, defendant is liable for the injury, whether or not he knew of the vicious propensity of his horse.[25]

(222) The court instructs the jury that if they find that the defendant's horse was in pasture on his wife's premises and while there broke over her part of the partition fence, separating her said lands from the field in which plaintiff's horse was being rightfully pastured by him, then the defendant's horse was unlawfully in the place where the plaintiff's horse was on pasture, and in such case, if the jury find that he killed plaintiff's horse, the defendant is liable to

[23] Approved in Triolo v. Foster (Tex. Civ. App.) 57 S. W. 698.
[24] Reynolds v. Hussey, 64 N. H. 64.
[25] Approved in Morgan v. Hudnell, 52 Ohio St. 552.

plaintiff for the injury, whether his horse was in fact vicious or not, and whether he knew of such viciousness or not.[26]

Same—General reputation to prove propensity.

(223) The court instructs the jury that a dog cannot be proven to be vicious and liable to bite mankind by evidence that the general reputation is that the dog is vicious and so liable.[27]

Same—Opinion evidence as to propensity.

(224) The court instructs the jury that some testimony has been produced here by witnesses who have stated to you the result of their reading in natural history, and the result of the opinion expressed by hunters and sportsmen, as to the general characteristics of the deer; and it is for you to say how much is proved by that evidence. The plaintiff claims to show by that evidence that the deer at a certain season of the year is a dangerous animal. It is for you to say whether, after the cross-examination of the witnesses, you can arrive at that conclusion.[28]

Sufficiency of restraint of vicious animal.

(225) The court instructs the jury that the fact that the defendant or defendant's wife may have been able to control the dog by calling him off or speaking to him when he would run at any one, even if the jury believe this fact proven, is not such a restraining as is contemplated by the law, and would not relieve or excuse the defendant from the charge of negligence if the other facts in said cause are proven that would require the defendant to restrain his dog.[29]

Provocation of animal causing injury.

(226) The court instructs the jury that the defendant claims that plaintiff, in passing the bull, provoked the bull

[26] Approved in Morgan v. Hudnell, 52 Ohio St. 552.
[27] Approved in Triolo v. Foster (Tex. Civ. App.) 57 S. W. 698.
[28] Approved in Spring Co. v. Edgar, 99 U. S. 645.
[29] Approved in Dockerty v. Hutson, 125 Ind. 102.

to make the attack upon him, by striking the bull with a cane or stick, without reasonable cause. If you find that the plaintiff struck the bull, and thereby excited him to make the attack you will not assume, as a matter of law, that the plaintiff was in fault, but you will inquire whether, under the circumstances, the plaintiff had or had not reasonable cause to strike the bull with his cane. You will carefully notice what the plaintiff did, if anything; his situation at the time, as it appeared to him; and all the circumstances surrounding him; and decide whether he acted as a man of ordinary prudence or not.[30]

Burden of proof of negligence.

(227) The court instructs the jury that the plaintiff has alleged in each paragraph, among other things, that he received the injury complained of without fault or negligence on his part. This is a material and necessary allegation. Without such allegation his complaint would not have been sufficient to have constituted a cause of action and before the plaintiff can recover he must have proved by a fair preponderance of the evidence that he did receive said injuries, without fault or negligence on his part, directly and materially contributing to the injury. It is not enough to enable the plaintiff to recover that he shall have proved fault and negligence on the part of the defendant; he must also prove that he himself was free from such fault or negligence, and, if he has failed to prove by a fair preponderance of the evidence that he received the injury without such fault or negligence on his own part he cannot recover.[31]

[30] Approved in Meier v. Shrunk, 79 Iowa, 17.
[31] Approved in Todd v. Danner, 17 Ind. App. 368.

CHAPTER XIV.

ARBITRATION AND AWARD.

Necessity of notice to parties and that award shall include all differences, 228.
Effect of resignation of one arbitrator, 229.
Setting aside award for partiality of arbitrators, 230.

Necessity of notice to parties and that award shall include all differences.

(228) The court instructs the jury that if you find from the evidence, that the plaintiff and defendant agreed to submit their differences to arbitration, and if you find such award was made as agreed, you should find for the plaintiff for the amount found by the arbitrators in such matter, unless you further find (1) that said award does not include all the differences in dispute between plaintiff and defendant at time of the alleged award; or (2) that defendant was not accorded a reasonable notice of the time of the hearing.[1]

Effect of resignation of one arbitrator.

(229) The court instructs the jury that if you believe from the evidence that one of the arbitrators, ———, was induced to resign or withdraw from the arbitration by reason of the agreement of the other two arbitrators, ——— and ———, to withdraw and resign their authority as such arbitrators, and thereby the said arbitrator ———, so resigning, was prevented from meeting with the arbitrators at the time of the making of the award, in such case the award is void, and you should find for the defendant.[2]

Setting aside award for partiality of arbitrators.

(230) The court instructs the jury that you are told that

[1] Approved in Amos v. Buck, 75 Iowa, 651.
[2] Approved in McCord v. McSpaden, 34 Wis. 541.

this selection of appraisers by the parties, and the selection of the umpire by the two appraisers, being shown to have been regular, it will be presumed that the award made by two of them is true and just; and this award must stand, unless the plaintiff has, by a fair preponderance of the evidence, shown that one or both of the parties signing it were at the time not impartial. If you believe that ——— and ———, at the time they signed this award, acted impartially and on their best judgment as to the amount awarded, then the award should be upheld, although you may find and believe from the testimony before you that said award under-estimates the damages sustained by plaintiff. If you believe that ——— and ———, or either of them, at the time they made this award, were not impartial arbitrators, and were partial to the interests of the defendant company, and the award was the result of such partiality, then the same cannot be upheld.[3]

CHAPTER XV.

ARREST.

Liability for arrest without warrant, 231-236.

Liability for arrest without warrant.

(231) If the jury shall find that the plaintiff, at the time she was arrested by the defendant was conducting herself in an orderly manner, and not committing any breach of the peace, then the defendant had no right or authority to arrest her.[1]

(232) No officer is justified in making an arrest without a warrant, when the person whom he arrests is peaceable

[3] Approved in Royal Ins. Co. v. Parlin & Orendorff Co., 12 Tex. Civ. App. 572.

[1] Approved in Pinkerton v. Verberg, 78 Mich. 573.

and not engaged in open violence, as for example, by fighting, engaging in a riot, or about to escape after committing a felony.[2]

(233) The law does not look with favor on arrests made without a warrant, and an arrest without a warrant cannot be justified if the person arrested was not engaged in a breach of the peace, as for example in fighting or in a riot or about to escape after having committed a felony.[3]

(234) If the jury shall find that the plaintiff, was at the time she was arrested walking on the street without molesting any one, then she was not committing any act that would justify the defendant in arresting her without a warrant, and his act in arresting her was unjustifiable, and the burden is on him to justify the act.[4]

(235) The court instructs the jury that it is no defense to an action for false imprisonment that the sheriff supposed he had a capias; nor had he any right to know there was an indictment for a misdemeanor or any other indictment against plaintiff. Until a capias was issued and placed in his hands, he had no right to arrest plaintiff, nor in any manner to molest him, because there had been an indictment, if there was any.[5]

(236) The court instructs the jury that this is an action by plaintiff against the defendant, for the illegal arrest by defendant of plaintiff, under circumstances of aggravation, as alleged by plaintiff. Under the laws of ———, no civil officer has the right to arrest a citizen of ——— unless he has a warrant, and if demanded, to exhibit same; or unless some offense against the criminal law is committed, by the person arrested, in the presence of the officer.[6]

[2] Approved in Pinkerton v. Verberg, 78 Mich. 573.
[3] Approved in Pinkerton v. Verberg, 78 Mich. 573.
[4] Approved in Pinkerton v. Verberg, 78 Mich. 573.
[5] Approved in Hall v. O'Malley, 49 Tex. 70.
[6] Approved in Hall v. O'Malley, 49 Tex. 70.

CHAPTER XVI.

ASSAULT AND BATTERY.[1]

Accidental injury, 237.
Self-defense—Only reasonable force justifiable, 238.
Same—Defendant's judgment controlling as to amount of force necessary, 239.
Same—Defendant's judgment controlling as to imminence of danger, 240.
Explaining expression, "Every man's house is his castle," 241.
Right to eject trespasser, 242.
Trespass may not be repelled by deadly weapon, 243.
Chastisement of pupil—Good faith no justification of excessive punishment, 244.
Same—Contrary doctrine, 245.
Ravishment in aggravation, 246.

Accidental injury.

(237) The court instructs the jury that if they find from the evidence that the defendant did not assault the plaintiff, but having his pistol in his hands for a lawful purpose, and by the negligent or careless handling of the pistol or by accident the pistol was discharged and the plaintiff received an injury, he cannot recover damages for that injury in this action. Again, if the plaintiff assaulted the defendant, the defendant having the pistol in his hands and the discharge of the pistol was caused by the pushing and jostling and assault of the plaintiff and it was discharged without design on the part of the defendant, then the defendant would not be liable for damages for the injury consequent upon the discharge of the pistol.[2]

Self-defense—Only reasonable force justifiable.

(238) The court instructs the jury that in defending himself against an unlawful attack of another, a man is

[1] See Homicide, for assault with intent to kill. Rape, for assault with intent to ravish. For general forms of instruction, see Criminal Law.

[2] Approved in Krall v. Lull, 49 Wis. 403.

justified in resorting to such violence and the use of such force as the particular circumstances of the case may require for his protection. Now, the degree of force to be employed in protecting one's person must be in proportion to the attack made, and must depend upon the circumstances in each particular case, and the imminence of danger as it appears to him at the time. The only purpose which justifies the employment of force against the assault is to defend one's self, that is the object to be attained; and a man is only justified in using such an amount of force as may appear to him at the time to be necessary to accomplish that purpose. As soon as that object is attained, it is his duty to desist. * * * If he used a kind of force towards his assailant in excess or out of proportion to what may be necessary to his own defense, as it honestly appeared to him at the time, he is himself guilty of an assault.[3]

Same—Defendant's judgment controlling as to amount of force necessary.

(239) The court instructs the jury that it is proper for you also to consider, if you find that plaintiff made the first attack, that the defendant, being required to act thus, in the excitement and heat of affray, could not be expected to exercise that nice discretion and accredited judgment which the jury by a careful sifting of the testimony of all the witnesses aided by the arguments of counsel and the charge of the court, would be able to do; and therefore his conclusion, though he acted honestly and in good faith, might not be perfectly correct and just. Therefore, this is the law, that if the defendant did use more force than is actually necessary for self-protection, if you find that he sincerely believed at the time that he was using only so much force as was necessary for his own defense, and if you also find that he acted honestly and in good faith in coming to that con-

[3] Approved in Kent v. Cole, 84 Mich. 579.

clusion, and if you find also from the evidence that such a belief was a reasonable belief on his part under the circumstances that surrounded him at the time and as the situation appeared to him,—then he would not be guilty of an assault by reason of the use of such excessive violence. * * * The defendant would be justified in resorting to such reasonable force as to him seemed to be necessary in the honest exercise of his judgment to protect himself from the injury which he fully believed the plaintiff was about to inflict upon him. * * * If you find such appearance justified that belief, and defendant's judgment was honestly exercised in coming to that conclusion, he would then have a right to thus repel or prevent the actual assault, using such force, and such alone as was reasonably necessary or appeared to him as reasonably necessary at the time to protect himself.[4]

Same—Defendant's judgment controlling as to imminence of danger.

(240) The court instructs the jury that the defendant was the best judge of what was necessary to defend himself against the attack, and of the means to be used for his own protection. As a technical legal proposition this is undoubtedly correct, and it is true not only as a matter of law, but as a matter of common sense, that the party attacked is obliged in the very nature of the case, to exercise his best judgment at the time as to what shall be done in his own defense, and his judgment is one which, if honestly exercised, is to a large extent controlling. It would be absolutely controlling unless the jury should find that his exercise of it at the time and under the circumstances was such an exercise as was unreasonable under all the evidence in the case.[5]

Explaining expression, "Every man's house is his castle."

(241) "Every man's house is his castle." This is an

[4] Approved in Kent v. Cole, 84 Mich. 579.

[5] Approved in Kent v. Cole, 84 Mich. 579.

old expression and comes down to us from those feudal times when the grand people lived in large fortified houses which were called castles. In these castles they resisted any entrance except by permission. From this source has come the expression that "every man's house is his castle." In accordance therewith every man's abode however humble is his castle; as is said "even though the winds of Heaven may blow through it and the rain pour into it the King of England cannot enter it."[6]

Right to eject trespasser.

(242) The jury are instructed that though plaintiff went upon the defendant's premises to transact lawful business, he had no right to remain after defendant refused to do business with him and requested him to leave and if he refused to leave after such request defendant had the right to eject him by force provided he used no more force than was reasonably necessary.[7]

Trespass may not be repelled by deadly weapon.

(243) The jury are instructed that though reasonable force may be used to eject a trespasser, the use of a dangerous weapon is not justified in repelling a trespass which does not threaten injury to life or limb.[8]

Chastisement of pupil—Good faith no justification of excessive punishment.

(244) The jury are instructed that though a teacher may inflict reasonable and necessary corporal punishment upon a pupil, if the jury believe that the punishment inflicted was unnecessary and excessive the fact that the teacher acted honestly in good faith and without malice is no defense.[9]

[6] Approved in Hammond v. Hightower, 82 Ga. 290.

[7] Woodman v. Howell, 45 Ill. 367; and see Breitenbach v. Trowbridge, 64 Mich. 393.

[8] Everton v. Esgate, 24 Neb. 235.

[9] Lander v. Seaver, 32 Vt. 114.

Same—Contrary doctrine.

(245) The court instructs the jury that if they find from the evidence that the defendant did chastise W., but that at the time the defendant was a school teacher, and said W. was his pupil, and that the chastisement was administered to him by defendant because said W. had engaged in a fight at school with another pupil, or had used improper and unbecoming language, or had in any other way violated the rules and regulations of the school; and that such chastisement was inflicted by the defendant upon said W. for the purpose of correcting him, and in good faith and without any intention on the part of the defendant to injure said W., and without any passion, spite or ill-will towards said W., then you will find the defendant not guilty, even though you should find from the evidence that the chastisement administered was more severe than was actually necessary.[10]

Ravishment in aggravation.

(246) The court instructs the jury that if they believe from the evidence, that the defendant assaulted the plaintiff, as testified to by her, by laying his hands on her, accompanied with the threat that he would kill her, if she did not consent to sexual intercourse with defendant, this in itself will warrant the jury in finding the defendant guilty, although the jury may further believe, from the evidence, that she ultimately freely assented to such intercourse. If, however, the jury believe that such ultimate assent was not freely given, but was yielded by the plaintiff only as a consequence of the preceding violence or force, then such sexual intercourse should be regarded by the jury as a part of the assault, and a ground for exemplary damages—that is, such as will compensate the plaintiff for any wrong to her, and to punish the defendant, and to furnish an example to deter others from like practices.[11]

[10] Dowlen v. State, 14 Tex. Cr. App. 61.

[11] Approved in Miller v. Balthasser, 78 Ill. 302.

CHAPTER XVII.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

Validity of assignment, 247, 248.
Fraud in assignment, 249-253.
Same—Coercing creditors or forcing compromise, 254, 255.
Same—Reservation of contract by assignor, 256.
Same—Selection of assignee or his incompetency as indicating fraud, 257-259.
Same—Subsequent declarations and acts of parties, 260, 261.
Same—Knowledge by assignee of fraud, 262.
Same—Fraudulent intent of assignee, 263.
Same—Knowledge by assignee of fraudulent intent of assignor, 264.
Attacking assignment because of facts extrinsic to assignment, 265, 266.
Assent of creditors, 267.
Interpretation and effect of assignment by firm, 268, 269.
Priority of execution creditor over assignments, 270, 271.

Validity of assignment.

(*Replevin by assignee against levying sheriff.*)

(247) The court instructs the jury that actual fraud is not to be presumed, but should be proven by the party alleging it. The law presumes that good faith controls business transactions; therefore, if the jury believe, from all the circumstances in evidence, that the nature and design of the assignment to plaintiff were bona fide, to secure and pay (after paying the just and reasonable expenses attending the executing the trust), the net proceeds of the property assigned in and toward the payment of the debts of O., and that said assignment was not contrived, as a fraud on the part of O. and the plaintiff, to cheat or hinder the creditors of O., the law is for the plaintiff; if the jury shall also find that the assignee took possession of the property, and that such possession was continued to and at the time of the levy.[1]

[1] Approved in Wilson v. Pearson, 20 Ill. 81.
These instructions were given on behalf of plaintiff.

(248) The court instructs the jury that a debtor in failing circumstances may assign his property for the benefit of creditors. An assignment when made in good faith, and accompanied and followed by possession of the property assigned, is warranted by law. Therefore, if the jury believe, from the evidence, that the assignment in question was made in good faith, and that the plaintiff took open and actual possession of the property assigned, previous to the time when the execution in favor of W. was received by the defendant ———, then the law is for the plaintiff, and he is entitled to a verdict in his favor for a return of the property mentioned in the declaration.[2]

Fraud in assignment.

(249) The court instructs the jury that the deed of assignment being in due form and regular on its face, fraud will not be presumed with reference to it, but the burden of proof is on the defendants to show it fraudulent. The presumption is that the deed was made in good faith and that it is untainted with fraud.[3]

(250) The court instructs the jury that the only subject of inquiry for the jury (so far as the question of fraud is concerned) is the intent with which the assignment was made, and acts wholly independent of the fact of assignment cannot be considered.[4]

(251) The court instructs the jury that an assignment is not fraudulent because it may or even must operate to obstruct or delay creditors; for every assignment, though made in good faith, must so operate. The jury must find that the intention of the act was to defraud creditors, and not to devote the property assigned to the payment of debts. If there was an intention to delay creditors, it would render

[2] Approved in Wilson v. Pearson, 20 Ill. 81.
These instructions were given on behalf of plaintiff.
[3] Approved in Guerin v. Hunt, 8 Minn. 477.
[4] Approved in Guerin v. Hunt, 8 Minn. 477.

the instrument void, but if there was no such intention, the necessary delay attending the execution of the trust was not material.[5]

Same.

(*Replevin by assignee against levying sheriff.*)

(252) The court instructs the jury that if they believe from the evidence, that the assignment from O. to plaintiff was made with intent to hinder, delay or defraud the creditors of O., then the verdict should be for the defendant; and in deciding upon the intent, the jury may take into consideration subsequent as well as prior circumstances, and the transactions of the parties, to explain such intent.[6]

(253) The court instructs the jury that if they shall believe from the evidence, that the assignment by O. was made to plaintiff with the intent to hinder and delay any of his other creditors, in the collection of their debts, to enable O., under the color thereof, to continue his business, and in possession of his property for his own benefit, then such assignment is fraudulent and void as to his creditors, and the jury should find a verdict for the defendant.[7]

Same—Coercing creditors or forcing compromise.

(*Replevin by assignee against levying sheriff.*)

(254) The court instructs the jury that if the real object or intent of ———, the assignor in making this assignment was not the one expressed on its face, but to induce, persuade or force creditors to agree and consent to a compromise, which he was then attempting to make with his creditors, and to compel such creditors to accept about one-half of their claims, then and in such case, the assignment was fraudulent, and void as to creditors.[8]

(255) The court instructs the jury that if the jury find

[5] Approved in Guerin v. Hunt, 8 Minn. 477.
[6] Approved in Wilson v. Pearson, 20 Ill. 81.
[7] Approved in Wilson v. Pearson, 20 Ill. 81.
[8] Bennett v. Ellison. 23 Minn. 242.

that ———, assignor, made the assignment with the intent and for the purpose of effecting a compromise with his creditors, or for the purpose of facilitating one already commenced, then the assignment is void, and you must return a verdict for the defendant.[9]

Same—Reservation of control by assignor.

(*Replevin by assignee against levying sheriff.*)

(256) The court instructs the jury that if they believe, from the evidence, that at or about the time of the assignment from O. to plaintiff, there was an understanding or stipulation between them, though not expressed in the assignment itself, to allow O. a specified sum for his services in the management of the property assigned, and that O. should retain possession of the same for his own benefit, as agent for plaintiff, or otherwise, to enable him to control his business to the hindrance of his creditors, such stipulation or understanding is evidence of fraud, and the defendant is entitled to a verdict.[10]

Same—Selection of assignee or his incompetency as indicating fraud.

(257) The court instructs the jury that the assignor having the choice of his assignee without consultation with or consent of his creditors, must take care that he appoints a person competent to protect the rights of all parties interested under the assignment. If it appears that the selection of an incompetent assignee was made in order to allow the assignor to control the administration of the estate, then the assignment will be declared void, because such an intent on the part of the assignor would be a fraud upon his creditors and if it should appear that the assignee was incompetent in fact from any cause, but that his selection was not made from any improper motive on the part of the assignor, then

[9] Approved in Bennett v. Ellison, 23 Minn. 242.

[10] Approved in Wilson v. Pearson, 20 Ill. 81.

the assignee would be subject to removal, and the assignment will be sustained.[11]

(258) The court instructs the jury that the business competency of the assignee is only material, so far as it tends to establish an intention on the part of the assignors to retain control over the property by reason of want of competency, and if the jury fail to find that such was the design of the assignors in the selection of ———, it is immaterial what were his business qualifications. In the absence of such fraudulent intention on the part of the assignors the only effect of such incompetency would be to render the assignee liable to removal on the proper application of a creditor.[12]

(259) The court instructs the jury that incompetency in an assignee, which in law would amount to a "badge of fraud," and which would tend to invalidate an assignment, is not merely a want of ability to read or write, or of the accomplishments taught in schools, but it also implies that the assignee is wanting in the capacity to manage and conduct the ordinary business of the assignment, and that the assigned estate must suffer neglect or be managed by the assignee as the instrument or tool of the assignors, for their benefit, and in fraud of the rights of creditors.[13]

Same—Subsequent declarations and acts of parties.

(*Replevin by assignee against levying sheriff.*)

(260) The court instructs the jury that if they shall find, from the evidence, that the assignment in question was in fact made by O. to plaintiff, and that plaintiff entered into and took open, actual and exclusive possession of the goods assigned, then the subsequent declarations and actions of plaintiff, introduced in evidence in this suit, and the subsequent declarations and actions of O., can only be taken

[11] Guerin v. Hunt, 8 Minn. 477.

[12] Approved in Guerin v. Hunt, 8 Minn. 477.

[13] Approved in Guerin v. Hunt, 8 Minn. 477.

into consideration by the jury, for the purpose of determining the intent at the time of the inception of the assignment, viz., whether such assignment was made with intent to hinder or delay creditors of O., and enable him, under cover thereof, to carry on business.[14]

(261) The court instructs the jury that if an assignment is bona fide, and not shown to be fraudulent as to creditors, then neither mismanagement nor fraudulent disposition of property under an assignment, by an assignee, can affect the instrument, or his title under it; they may be grounds for a removal by a court of equity, but cannot be inquired into in an action at common law, brought to try his title to the property assigned.[15]

Same—Knowledge by assignee of fraud.

(262) The court instructs the jury that if they believe from the evidence that ———, the assignor, executed the assignment with the fraudulent intent of compelling his creditors to consent to a compromise which ——— was attempting to make with his creditors, then the jury are instructed that such assignment will be void as to creditors, even though they believe from the evidence that plaintiff, the assignee, had no notice or knowledge of such fraudulent intent at or prior to the time he accepted the assignment.[16]

Same—Fraudulent intent of assignee.

(*Replevin by assignee against levying sheriff.*)

(263) The court instructs the jury that as to the assignment under which the plaintiff claims in this case, there is but a single question for you to pass upon, viz.: What was the intent of the assignor and what was his purpose in making it? The intent with which plaintiff received the assignment is immaterial.[17]

[14] Approved in Wilson v. Pearson, 20 Ill. 81.
[15] Wilson v. Pearson, 20 Ill. 81.
[16] Bennett v. Ellison, 23 Minn. 242.
[17] Approved in Bennett v. Ellison, 23 Minn. 242.

Same—Knowledge by assignee of fraudulent intent of assignor.

(Replevin by assignee against levying sheriff.)

(264) The court instructs the jury that plaintiff, under this assignment, does not stand in the position of a purchaser for valuable consideration; and the fact (if such be the case) that he had no knowledge that it was ———, assignor's intention, in making the assignment, to effect a compromise with his creditors cannot cure the effect of such intention on ———, assignor's part. If such intention existed on ——— assignor's part, at the time he executed the assignment, it is void, no matter whether plaintiff knew ———, assignor's intention or not, and your verdict should be for the defendant.[18]

Attacking assignment because of facts extrinsic to assignment.

(265) The court instructs the jury that the mode of management of the trust by the assignee does not of itself affect the assignment. If it was valid at its inception, the acts and conduct of the parties subsequent to the assignment are only material, as they serve to throw light upon the question of the original intent in making the assignment.[19]

(266) The court instructs the jury that the employment by the assignee of one of the assignors in closing up the business of the assignment is not inconsistent with the objects of the trust, and is not necessarily indicative of a fraudulent intent in making the assignment. The jury will judge from the facts in the case whether the object was for the assignor still to retain the control over the goods, in connection with the question as to the original intent of the assignor in making the assignment.[20]

Assent of creditors.

(267) The court instructs the jury that the document

[18] Approved in Bennett v. Ellison, 23 Minn. 242.

[19] Guerin v. Hunt, 8 Minn. 477.

[20] Approved in Guerin v. Hunt, 8 Minn. 477.

under which plaintiff claims in this case, provides that the assent of the creditor need not be a written assent. * * * It is only necessary that creditors should give such assent to its provisions as will recognize and affirm the acceptance and possession of the property by the assignee, as made and held for their benefit and in their behalf, in accordance with the terms of the assignment. The acquiescence is something more than negative. * * * It is acquiescence and consent; a state of mind on the part of the creditor who knowing the facts, gives the assignee to understand that he acquiesces in his keeping the property under the trust, and disposing of it accordingly. It is not necessary that the word assent should be used. It is not necessary that any legal formula should be employed. If the assignee informs the creditors of the facts, and makes a fair statement to them of the facts, exhibiting to them the deed of trust, if they want to see it, and they so conduct themselves towards him in what they say and do that he, a reasonable man, understands them to assent, and acts in good faith upon that understanding, then for the purpose of this case they must be taken to have assented.[21]

Interpretation and effect of assignment by firm.

(268) The court instructs the jury that the assignment to the plaintiff was the joint act of B. and C., acting as copartners under their firm name of B. & C., and purported to be a general assignment of the partnership property of that firm, and of that partnership property only.[22]

(269) The court instructs the jury that the deed of assignment does not on its face purport to convey any of the individual property of either B. or C., but leaves the same in all respects so far as it (the assignment) is concerned, subject to every debt and liability of the respective owners of such individual property.[23]

[21] Approved in Nutter v. King, 152 Mass. 355.
[22] Approved in Guerin v. Hunt, 8 Minn. 477.
[23] Approved in Guerin v. Hunt, 8 Minn. 477.

Priority of execution creditor over assignments.

(Replevin by assignee against levying sheriff.)

(270) The court instructs the jury that if they find, from the evidence, that after the alleged assignment to plaintiff, and after the levy of the execution in favor of W. by the defendant, and possession taken by him, the debtor and assignor, O., confessed a judgment in favor of plaintiff for the amount of a claim owing to plaintiff, and that plaintiff thereupon caused execution to be issued, and directed a levy upon the assigned property to be made by defendant, and that the said judgment was so confessed, and execution was so levied with the intent to abandon said assignment, then the levy under the execution in favor of W. acquired a priority of lien over the goods in question, and the jury should find for the defendant.[24]

(271) The court instructs the jury that if they shall find from the evidence, that the assignment in question was bona fide, then, unless it is also shown by the evidence that the assignee, the plaintiff, did take actual and exclusive possession of the goods before the levy by defendant under the execution in favor of W., the verdict should be for the defendant.[25]

CHAPTER XVIII.

ASSUMPSIT.

Action for money had and received, 272, 273.
Action for money paid, laid out and expended by plaintiff at the request of defendant, 274.

Action for money had and received.

(272) The court instructs the jury that the plaintiffs may recover in this suit, if the jury believe, from the evi-

[24] Approved in Wilson v. Pearson, 20 Ill. 81.
[25] Approved in Wilson v. Pearson, 20 Ill. 81.

dence, that the defendant had in his possession, when this suit commenced, money which, in equity and good conscience, belongs to the plaintiffs; and if the jury believe, from the evidence, that said defendant received the proceeds of the grain described in the declaration, and that said grain belonged to the plaintiffs, then the jury will find for the plaintiffs; and if the jury so believe, and believe from the evidence, that said defendant promised to pay to the plaintiffs the money in controversy in this case, then the jury will find for the plaintiffs.[1]

(273) The court instructs the jury that if they believe, from the evidence, that the defendant R. promised to pay the plaintiffs the proceeds of the sale of the ——— mentioned in the first above instruction, then the jury may take this fact into consideration in determining whether the defendant R. received the proceeds for the sale of said ———, and the jury will find for the plaintiffs if they so believe that he received the proceeds of the same.[2]

Action for money paid, laid out, and expended by plaintiff at the request of defendant.

(274) The court instructs the jury that if they believe from the evidence that (the defendant proposed to give the sum of ——— to relieve his township from a draft and upon the condition that his sons should be relieved from liability to draft, and if the jury believe from the evidence that plaintiff on the faith of that promise expended time and money for the purpose of relieving the township from liability to draft and succeeded, and by his efforts relieved the sons of the defendant from liability to be drafted into the military service of the United States, then the jury should find for the plaintiff for the sum of ———).[3]

[1] Approved in Reichwald v. Gaylord, 73 Ill. 503.
[2] Approved in Reichwald v. Gaylord, 73 Ill. 503.
[3] Wilson v. McClure, 50 Ill. 366.

CHAPTER XIX.

ATTACHMENT.

Liability for wrongful attachment, 275-278.
Burden of proof, 279.

Liability for wrongful attachment.

(275) The court instructs the jury that if they believe from the evidence that the plaintiff was removing, was about to remove, or had, within thirty days before the issuance of the said attachment, removed any of his effects from the leased premises (whether with a fraudulent purpose or not, or whether any rent was then due or not), then such removal, or contemplated removal, was of itself sufficient cause for the said attachment, and the plaintiff is not entitled to recover anything in this action, unless the jury believe that there was, or would have been, left on the premises property liable to distress sufficient to satisfy a year's rent.[1]

(276) The jury are instructed that if they believe from the evidence that there was a deed of trust on the property attached, to ———, trustee, made by the plaintiff after the property was carried on the leased premises, and such trustee intended to remove any of the said property from the leased premises, by sale or otherwise, not leaving sufficient property on the leased premises to satisfy a year's rent, and without securing to the landlord a year's rent, such intention on the part of said trustee was of itself sufficient cause for suing out the said attachment.[2]

(277) The court instructs you that if you believe from the evidence that the grounds set out in the affidavit for attachment were not true, plaintiff would be entitled to actual

[1] Offterdinger v. Ford, 92 Va. 636.
[2] Offterdinger v. Ford, 92 Va. 636.

damages which the proof shows he may have sustained. The affidavit recites that the plaintiff had disposed of his property for the purpose of defrauding his creditors and if you believe from the evidence that the plaintiff at, and before the suing out of the attachment, had disposed of his property with intent to defraud his creditors, or if you find that plaintiff had disposed of his property and the natural effect of such disposition was to withdraw and place the property of plaintiff beyond the reach of his creditors, then you will find for defendant.[3]

(278) The court instructs the jury that they shall inquire into the truth or veracity of the affidavit made for the attachment alleged in this suit to be wrongful and if it be true or if the jury believe from the evidence that at the time said affidavit was made to secure the attachment, on the ground that the plaintiff in this suit was about to convert the property into money for the purpose of placing it beyond the reach of his creditors, then the plaintiff is not entitled to any actual damages against the person suing out the attachment and the sureties on the attachment bond, but if the jury shall believe from the evidence that the plaintiff was not about to so convert his property or a part thereof into money for the purpose of placing it beyond the reach of his creditors, then the jury are instructed that such attachment was wrongfully sued out and you will find for the plaintiff.[4]

Burden of proof.

(279) The court instructs the jury that if they believe from the evidence that the attachment sued out by defendants against the plaintiff, the ——— day of ———, 19—, was sued out with sufficient cause, then the jury will find a verdict for the defendants; and the burden of showing the absence of sufficient cause rests upon the plaintiff.[5]

[3] Approved in Blum v. Strong, 71 Tex. 321.
[4] Blum v. Davis, 56 Tex. 423.
[5] Approved in Offterdinger v. Ford, 92 Va. 636.

CHAPTER XX.

ATTORNEY AND CLIENT.

I. Retainer and Authority of Attorney.

Necessity of retainer, 280, 281.
Necessity of express retainer, 282-284.
Same—Liability of corporation to attorney employed by president, 285, 286.
Authority of attorney in conduct of litigation, 287, 288.
Authority of attorney to enter into compromise, 289, 290.
Delegation of authority of attorney, 291.
Ratification by client, 292, 293.
Notice to attorney, 294-296.

II. Liabilities Between Attorney and Client.

Duties of attorney to client, 297.
Learning and skill of attorney, 298-301.
Failure of attorney to defend suit, 302.
Joint adventure between attorney and client, 303.
Compensation of attorney, 304-307.
Lien for services, 308.
Recovery by attorney for advances to client, 309.

I. Retainer and Authority of Attorney.

Necessity of retainer.

(280) The parties making the contract by which plaintiffs' services in the case of ——— were procured, if you find such contract was made, are alone liable to plaintiffs for their fee in said cause.[1]

(281) The court instructs the jury that, so far as the liability of this defendant is concerned it makes no difference what plaintiffs understood as to the defendant being liable to them for their fee in said case of ———. If you believe from the evidence that plaintiffs' services in said cause of ——— were not procured by the defendant, then

[1] Approved in Humes v. Decatur Land Im. & Furnace Co., 98 Ala. 461.

this defendant is not liable to plaintiffs for their services in said case, and your verdict should be for the defendant.[2]

Necessity of express retainer.

(282) The court instructs the jury that, however valuable the services of plaintiffs, for which this suit is instituted, may have been to the defendant, yet plaintiffs cannot recover of said defendant unless they were employed by it in the suit in which such services were rendered.[3]

(283) The court instructs the jury that, notwithstanding the defendant may have been benefited by the services rendered by plaintiff in the case of ———, if you believe such to be a fact, yet the jury is not authorized to go beyond the parties making the contract by which such services in such cause were procured in search of an implied promise to pay for such incidental benefit.[4]

(284) The court instructs the jury that, the law is that when plaintiffs were employed and entered upon their employment in the case of ———, their duty was a vigilant prosecution of the rights of ——— in that litigation. If you believe from the evidence they were employed by defendant, it is immaterial what benefit the defendant derived from the services rendered by them in this cause in the prosecution of the rights of said ———. If said services were not procured by said defendant, it is not liable to plaintiffs in this case.[5]

Same—Liability of corporation to attorney employed by president.

(285) The court instructs the jury that if you believe

[2] Approved in Humes v. Decatur Land Im. & Furnace Co., 98 Ala. 461.

[3] Approved in Humes v. Decatur Land Im. & Furnace Co., 98 Ala. 461.

[4] Approved in Humes v. Decatur Land Im. & Furnace Co., 98 Ala. 461.

[5] Approved in Humes v. Decatur Land Im. & Furnace Co., 98 Ala. 461.

from the evidence that both G. the president of the defendant company and the defendant were interested in the property involved in the litigation of G. v. ——— and that G. individually employed plaintiff to press an interpretation of the contract involved in said suit favorable to the interest of said G. and said defendant, and that plaintiff was not at the same time employed by said defendant in said cause, then this was G.'s individual act,—G.'s individual contract, —and the defendant would not be liable to plaintiff therefor.[6]

(286) The court instructs the jury that, if you believe from the evidence that plaintiff was employed by G. the president of the defendant company, in the case of G. v. ——— and the defendant company was in like interest with said G. in the result of the litigation of the case of G. v. ———, and that said defendant was benefited by the services rendered by plaintiff in said cause, yet there is no rule of law which fastens the liability upon said defendant for any part of plaintiff's fee in said case unless plaintiff was employed therein by said defendant company.[7]

Authority of attorney in conduct of litigation.

(287) The court instructs the jury that when a demand is placed in the hands of an attorney for collection, he has authority to determine what proceedings he will take and in making such determination and acting thereon, he binds his client, whether the proceeding was one in which the services of the attorney were absolutely essential or not.[8]

(288) The court instructs the jury that when one puts his case against another into the hands of an attorney to be prosecuted to judgment, it is a reasonable presumption

[6] Approved in Humes v. Decatur Land Im. & Furnace Co., 98 Ala. 461.

[7] Approved in Humes v. Decatur Land Im. & Furnace Co., 98 Ala. 461.

[8] Poucher v. Blanchard, 86 N. Y. 256.

that the authority he intends to confer upon the attorney includes such action as the latter may decide to be legal, proper and necessary in the prosecution of the demand, and that consequently whatever adverse proceedings may be taken by the attorney are to be considered, so far as they affect the defendant in the suit, as approved by the client in advance, and therefore as his act, even though they prove to be unwarranted by the law.[9]

Authority of attorney to enter into compromise.

(289) The court instructs the jury that the ordinary employment of an attorney at law does not authorize him to compromise or release a claim, settle a suit, or alter the terms of his client's contract.[10]

(290) The court instructs the jury that if they believe from the evidence that the defendant's husband purchased the land involved in this suit, for the benefit of his wife, at a time when the husband was free from debt, and on suit being brought by the husband's creditors to set aside the conveyance as being in fraud of their rights, the attorney for defendant, believing that the defendant had no valid defense, agreed to a compromise and consented that a decree should be rendered against the defendant, and if the jury believe from the evidence that the defendant did not consent to such compromise, then the jury are instructed that such compromise cannot stand.[11]

Delegation of authority of attorney.

(291) The court instructs the jury that an attorney employed to prosecute a suit in the absence of direction from his client, cannot delegate his authority as such to another attorney.[12]

[9] Foster v. Wiley, 27 Mich. 244.

[10] Mandeville v. Reynolds, 68 N. Y. 528.

[11] Mathews v. Massey, 63 Tenn. (4 Baxt.) 450.

[12] Morgan v. Roberts, 38 Ill. 65; Buckley v. Buckley, 64 Hun (N. Y.) 632.

Ratification by client.

(292) The court instructs the jury that while an attorney must have a special authority in order to compromise a suit, yet an unauthorized settlement by an attorney will become valid upon ratification; and such ratification may be inferred from knowledge, acquiescence and acceptance of the benefits.[13]

(293) The court instructs the jury that if they believe from the evidence (that A. acting as attorney for plaintiff agreed with defendant to pay a sum of money to the defendant, and that the defendant at the same time was to execute a deed to the plaintiff and that this payment of money and execution of the deed was to be in settlement of all matters in controversy between plaintiff and the defendant, and if the jury believe from the evidence that the money was paid to defendant in pursuance of such agreement and that the defendant executed the deed in pursuance of the agreement, and that the plaintiff accepted the benefits of the agreement and accepted the deed made in pursuance thereof, and took possession of the land, and if the jury believe from the evidence that the want of authority of A. to make the agreement was not known to the defendant, then the plaintiff's acceptance of the benefits of the contract, if he did so accept, constitutes a ratification of the act of his attorney in making the agreement).[14]

Notice to attorney.

(294) The court instructs the jury that notice to the attorney of a purchaser of land, on paying for the same, that the wife of the grantor claimed the property, is notice to the purchaser.[15]

(295) The court instructs the jury that knowledge or notice obtained by an attorney of matters in which he is not

[13] Wetherbee v. Fitch, 117 Ill. 67.

[14] Travellers' Ins. Co. v. Patten, 119 Ind. 416.

[15] Edwards v. Hillier, 70 Miss. 803.

acting professionally for his client, is not imputable to the client.[16]

(296) The principle that a client is chargeable with notice given to his attorney does not necessarily extend to charging a man who consults an attorney about the title to land with all the knowledge which such attorney may possess on the subject.[17]

II. Liabilities between Attorney and Client.

Duties of attorney to client.

(297) The court instructs the jury that it is the duty of an attorney towards his client that he shall not use any information which he has derived from his client to the prejudice or injury of his client, and that he shall not act in opposition to his client's interests.[18]

Learning and skill of attorney.

(298) The court instructs the jury that besides the fidelity an attorney owes to the interests of his client, he must also have sufficient learning to determine, with reasonable accuracy, upon the appropriate remedies for enforcing or securing the rights of his client, and sufficient skill to conduct the proceedings appropriate to such remedies.[19]

(299) The court instructs the jury that an attorney must employ in his undertaking a reasonable degree of care and skill, for the want of which he must respond in damages to the client to the extent of the injury sustained, but that the attorney is not liable for every mistake that may occur in practice. If he acts with a proper degree of attention, with reasonable care and to the best of his skill and knowledge, he will not be held responsible.[20]

[16] Larzelere v. Starkweather, 38 Mich. 96.

[17] Meuley v. Zeigler, 23 Tex. 88.

[18] Hatch v. Fogerty, 33 N. Y. Super. Ct. (1 J. & S.) 166.

[19] Hatch v. Fogerty, 33 N. Y. Super. Ct. (1 J. & S.) 166.

[20] Stevens v. Walker, 55 Ill. 151; Wilson v. Russ, 20 Me. (2 App.) 421.

(300) The court instructs the jury that if they find from the evidence in this case that the plaintiff became surety for P. and W., who were the principal debtors, on the bond read in evidence, and that afterwards judgments were obtained in the ——— court of ——— county against the parties to the said bond; and that at the time of the entering of the said judgments the said P. was utterly insolvent and is still insolvent, but that the said W. was and still is solvent and fully able to pay and satisfy the said judgments, and further find that the said plaintiff then applied to and retained the defendant as his attorney and counsellor, as to his liabilities and rights as said surety on the said bond, and if the jury further believe from the evidence that at the time of the said retainer and application, the defendant was an attorney at law, admitted to practice in the said court and where the said judgments were of record; and that being retained by the said plaintiff for the parties above mentioned, the defendant in respect to the liabilities and rights of the said plaintiff, under the law, as such surety, advised him that he was responsible for the one-half of the money represented in and by the said judgments; and that he could not avoid losing the one-half of the said sum of money; and also advised him to pay the one-half of the said sum of money; and to execute and deliver to the said W. the release read in evidence, and also further find that the said plaintiff acted upon the said advice and in pursuance thereof paid the one-half of the said money and executed and delivered the release read in evidence, then the plaintiff is entitled to recover provided the jury further find that the advice given and acted upon by the said plaintiff was not such advice as an attorney of ordinary skill, prudence, and intelligence would or ought to have given.[21]

(301) The court instructs the jury that an attorney is not an insurer of the result in a case in which he is employed,

[21] Approved in Cochrane v. Little, 71 Md. 323.

without a special contract to that effect, nor can more than ordinary skill, care and diligence be required of him without such contract; and where an attorney has acted in good faith, and with a fair degree of intelligence, in the discharge of his duties under the usual implied contract, any error which he may make must be so gross as to render wholly improbable any disagreement among good lawyers as to the manner of the performance of the services in the given case, before the attorney can be held responsible.[22]

Failure of attorney to defend suit.

(302) The court instructs the jury that if they believe from the evidence that defendant was employed by plaintiff to defend the suit described in the declaration and that defendant failed to defend the suit and by reason of such failure judgment was rendered against the plaintiff, then before the defendant can be made liable for the whole amount of the judgment recovered against the plaintiff, the jury must believe from the evidence that the defendant was made aware of the nature of the defense he was expected to make in the suit described in the declaration.[23]

Joint adventure between attorney and client.

(303) The court instructs the jury that while the law is, that dealings between attorney and client, resulting in advantage to the former, will be closely scrutinized, and the attorney be required to show the utmost good faith and fairness, and that the client dealt with full knowledge of his rights, the law does not prohibit all dealings between the attorney and client or declare all contracts made by the attorney with the client *ipso facto* void, or voidable at the instance of the client, and if the jury believe from the evidence that (the plaintiff with full knowledge of all the facts entered into a joint venture with the defendant, his attor-

[22] Babbitt v. Bumpus, 73 Mich. 331.

[23] Grayson v. Wilkinson, 13 Miss. (5 Smedes & M.) 268.

ney, and that the defendant acted in perfect good faith, then the defendant will not be required to account to the plaintiff for defendant's share of the profits derived as a result of the joint venture).[24]

Compensation of attorney.

(304) The court instructs the jury that an attorney is not required to insure a client as to the ultimate result of the proceedings which he has advised, nor is the client justified in refusing to compensate him because in the subsequent development of affairs, it appears that a course other than that adopted would have resulted more advantageously for the client[25] and if they believe from the evidence that the plaintiff as attorney was employed by the defendant to conduct the litigation described in the complaint and that the plaintiff gave the advice alleged in the complaint and pursued the proceedings therein described for the purpose of attaining the ends of his employment, then although the litigation instituted by plaintiff on behalf of defendant was unsuccessful, the court instructs the jury that the advice given and the course pursued by plaintiff did not indicate a lack of ordinary skill and capacity so as to deprive plaintiff of the right to compensation.[26]

(305) The court instructs the jury that in the absence of a contract fixing the value of services rendered by the attorney, the attorney rendering the services has a right to reasonable compensation and that in considering the reasonableness of such compensation the jury may take into consideration all the circumstances of the case and are not bound by the opinions of witnesses experienced as experts, but those opinions should be considered in connection with the other evidence in the case.[27]

[24] Rolfe v. Rich, 149 Ill. 436.
[25] Harriman v. Baird, 6 App. Div. (N. Y.) 518.
[26] Bowman v. Tallman, 27 How. Pr. (N. Y.) 212.
[27] Rose v. Spies, 44 Mo. 20.

(306) The court instructs the jury that in ascertaining the reasonable value of the services of plaintiff you will consider the nature of the litigation, the amount involved and the interests at stake, the capacity and fitness of plaintiff for the required work, the services and labor rendered by plaintiff, the length of time occupied by him and the benefit if any derived by defendant from the litigation. You are further instructed to look to all the evidence in the case and to exercise your sound discretion and judgment thereon and allow plaintiff such reasonable amount as you may believe he is justly entitled to not to exceed the amount claimed in his petition.[28]

(307) The court instructs the jury that if you find that the plaintiff performed certain legal services for the defendant with the defendant's knowledge and consent, and that defendant received the benefits thereof without objection, then plaintiff will be entitled to recover the reasonable value of such services, unless defendant has established by a fair preponderance of the evidence that they were performed under a contract made by him with A., by which A. agreed that plaintiff should perform the said services, and the value thereof should be indorsed upon an indebtedness which was then owing by A. to the defendant, and that the plaintiff had knowledge of such agreement.[29]

Lien for services.

(308) The court instructs the jury that the plaintiff, L., managed the case of ——— on behalf of defendant, and defendant knew that he was managing it. There is no pretense that he objected to the managing of that suit by L.; and he knew that the suit was commenced; that he had a suit in this court against the ——— company, in which L. was his attorney. It is denied that he ever employed him to do it so as to make himself liable to pay him his fees, but

[28] Approved in International & G. N. R. Co. v. Clark, 81 Tex. 48.
[29] Approved in Hudspeth v. Yetzer, 78 Iowa, 11.

it is not denied that he knew he was doing it. There is no pretense that L. was representing a name which he had no right to represent. He was not doing wrong to defendant then, in managing that suit and prosecuting it to completion. Judgment was rendered which produced the money for which defendant sued. Now, I say to you, as a matter of law, that as soon as that judgment was rendered, whoever might be the owner of the judgment, L. had a lien upon it for the amount of his fees and disbursements in the case. It was money he had a lien upon, so that whatever he is entitled to collect from ———, he is entitled to take out of the money that was received upon that execution.[30]

Recovery by attorney for advances to client.

(309) The court instructs the jury that if they find from the evidence that the plaintiff has performed services for the defendant, with her consent, since ——— and has advanced and paid moneys for her while acting as her solicitor, in matters connected with her employment, they will find for the plaintiff a reasonable value for such services, as shown by the evidence, and also the amount of moneys which the evidence shows he has advanced for her.[31]

CHAPTER XXI.

BAILMENTS.[1]

Bailment or sale—Recovery of value, 310.
Same—Buying raw material on commission to be manufactured and returned, 311.
Delivery to bailee—Wearing apparel or personal effects left in stores, etc., 312, 313.

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[30] Lindner v. Hine, 84 Mich. 511.

[31] Bennett v. Connelly, 103 Ill. 50.

[1] See, also, titles descriptive of particular kinds of bailment, as Carriers; Inns and Innkeepers; Warehousemen.

Symbolical delivery to bailee, 314.
Delivery on Sunday and subsequent ratification, 315.
Tests of diligence, 316.
Diligence—Bailee without hire or reward, 317, 318.
Same—Disobedience of instructions by gratuitous bailee, 319.
Duty and diligence of borrower without hire, 320, 321.
Mutuality of benefit—Degree of care, 322.
Hiring—Degree of care, 323-325.
Same—Want of knowledge on bailee's part, 326.
Same—Exceeding terms of the hiring, 327-329.
Same—Inevitable casualty, 330, 331.
Skill of workman, 332-334.
"Ordinary" or "reasonable" skill, 335, 336.
Delegation by bailee, 337.
Contributory negligence of bailor, 338.
Same—Knowledge that bailee was careless, 339.
Same—Furnishing bad materials to workman, 340.
Bailor's liability—Letting dangerous chattel for hire, 341.
Same—Unfit animals, 342.
Same—Bailee continuing to knowingly work unfit animal, 343.
Contracts limiting or defining liability, 344, 345.
Termination of gratuitous bailment—Rights and duties, 346-348.
Surrendering chattels to third person, 349.
Compensation and lien, 350.
Same—Waiver, 351.
Burden of proving negligence, 352.
Evidence—Admissions, 353.

Bailment or sale—Recovery of value.

(310) The court instructs the jury that if the (state the identical thing, as lumber) which was delivered by the plaintiff to defendant was to be re-delivered or restored, though in an altered form, it was a bailment, and the title to the property did not pass out of the plaintiff and plaintiff cannot recover its value from defendant, but if defendant was not to restore the (lumber) which was delivered to him but was at liberty to return other (lumber) of equal value, defendant becomes a debtor to make the return, and the title of the property is changed. In the latter case it is a sale and defendant is liable for the value of the (lumber).[2]

[2] Foster v. Pettibone, 7 N. Y. (3 Seld.) 433; Hyde v. Cookson, 21 Barb. (N. Y.) 92.

Same—Buying raw material on commission to be manufactured and returned.

(311) The court instructs the jury that if the jury find from the evidence that the plaintiff was to furnish (a quantity of hides) to defendant, which defendant was to convert into (leather) and return to plaintiff for a compensation, and if they also find that the title to the (hides) was not to be changed by the transaction, but was to remain in plaintiffs; then the jury must find that the contract was one of bailment and not of sale, and that the ownership did remain in the plaintiff, notwithstanding the jury should also find from the evidence that the plaintiffs were to receive a commission for buying the (hides), and a further commission for selling the (leather), and that the defendant was to be compensated only out of the net proceeds remaining, if any, after deducting costs, expenses, commissions, insurance and interest.[3]

Delivery to bailee—Wearing apparel or personal effects left in stores, etc.

(312) The court instructs the jury that if they find that defendant was a shopkeeper offering ready-made clothing for sale, and that plaintiff was a customer, then defendant impliedly invited the plaintiff to deliver clothing into defendant's care while trying on other garments with the assistance of clerks provided for that purpose, and under such circumstances defendant was the custodian of the plaintiff's clothing for profit, and was bound to exercise ordinary care in protecting it against loss.[4]

(313) The court instructs the jury that though the defendant is liable for failure to exercise ordinary care in protecting clothing laid aside by plaintiff while trying on gar-

[3] Change words inclosed in ( ); so decided in Hyde v. Cookson, 21 Barb. (N. Y.) 92.

[4] Bunnell v. Stearn, 26 Abb. N. C. 238, 122 N. Y. 539, 34 N. Y. St. Rep. 218; Woodruff v. Painter, 150 Pa. St. 91.

ments with a view to purchase, yet if you find that the defendant had provided a safe place for the keeping of such garments, and an attendant to care for them, but that instead of giving his coat to such attendant the plaintiff himself hung it upon a hook in another place from which it was stolen, then the loss is the result of the plaintiff's negligence, and your verdict will be for defendant.[5]

Symbolical delivery to bailee.

(314) The court instructs the jury that though it is necessary that the property should have been delivered to (defendant, or plaintiff—the bailee) in order to constitute (state what undertaking was made), yet such delivery may be symbolical or of a part of the whole property which is the subject-matter of the undertaking. The delivery of a key where the goods are locked up is so far a delivery of the goods that it will support (plaintiff's or defendant's—the bailee's) possession.[6]

Delivery on Sunday and subsequent ratification.

(315) The court instructs the jury that if they believe from the evidence that the defendant was intrusted with the safe-keeping of money belonging to the plaintiff and that part of said money was delivered to him on Sunday, and the defendant thereafter on a week day admitted the sum of $167.44 to be in his hands belonging to the plaintiff and promised to apply the same in payment of the rent for the premises mentioned in and under the contract offered in evidence, but neglected and failed to apply said money in payment of said rent, then the jury must find for the plaintiff for said amount of money in the hands of the defendant, and in their discretion may allow interest thereon from the time the defendant failed to pay the same as promised by him.[7]

[5] Trowbridge v. Schiever, 5 Daly (N. Y.) 11.

[6] Nevan v. Roup, 8 Iowa, 207.

[7] Approved in Haacke v. Knights of Liberty S. & L. Club, 76 Md. 429.

Tests of diligence.

(316) The court instructs the jury that in determining whether the (bailee, plaintiff or defendant) has exercised a proper and sufficient diligence, the jury may consider the nature and value of the chattel which was delivered to him, also the customs of the particular place or trade, also conditions of the country or climate, also the condition of the times during which the terms of the (bailee's—plaintiff's or defendant's) undertaking were to be performed. If the chattel in question was of great value and small bulk a higher degree of care was required. The (bailee) should have taken such precautions as the customs of his trade or of the locality usually required. He should especially have guarded against extremes of climate if the chattel was of a nature likely to be injuriously affected thereby, and he should have provided such appliances and used such diligence in the care of the property as were appropriate to the age or times in which his undertaking was made.[8]

Diligence—Bailee without hire or reward.

(317) The court instructs the jury that one who undertakes, without reward, to take care of the chattels or properties of another or to perform any duty or labor, upon them is required to use in its performance such care as men of common prudence, however inattentive, ordinarily take of their own affairs, and he will be liable only for bad faith or gross negligence which is an omission of such a degree of care.[9]

(318) The court instructs that persons who undertake without reward, are bound to exercise such reasonable care as men of common prudence usually bestow for the protection of their own property of a similar character. The exercise of reasonable care is in all cases such as is dictated by good faith, and is such care as is usually and generally deem-

[8] Story, Bailments, § 15; Lawson, Bailments, § 12.

[9] Kelly v. Kahn, 17 Ill. 170.

ed necessary in the community for the security of similar property under like conditions, but no more. In order to find negligence, the jury must find as a fact that such reasonable care as was required by the circumstances of the case, was omitted.[10]

Same—Disobedience of instructions by gratuitous bailee.

(319) The court instructs the jury, that although a gratuitous bailee is bound to exercise only slight care, yet it is his duty to follow the instructions given by the bailor, and if the jury find from the evidence that defendant gratuitously undertook to (here state what, e. g. carry the money of the plaintiff to a certain place and there deliver it), and (here state the violation e. g. that after receiving the money defendant gave it into the care of a third person who undertook to deliver it, but that it was stolen from the pocket of such third person while on the way), then defendant is liable to the plaintiff for the loss of the money.[11]

Duty and diligence of borrower without hire.

(320) The court instructs the jury that a borrower of a chattel without paying hire for its use is bound to extraordinary diligence and is responsible for the slightest neglect. He is bound to exercise all the care and diligence that the most careful persons apply to their own affairs and the omission of the most exact and scrupulous caution is regarded by the law as a culpable neglect.[12]

(321) The court instructs the jury that if they find from the evidence that the property of plaintiff was loaned by the plaintiff to the defendant for the sole benefit of defendant, the defendant is bound to exercise extraordinary diligence in protecting the property against loss or injury, and is responsible for slight neglect in respect to it, and it is defendant's duty to bring to the thing loaned all possible care.[13]

[10] Preston v. Prathers, 137 U. S. 604.
[11] Colyar v. Taylor, 41 Tenn. 372.
[12] Scranton v. Baxter, 6 N. Y. Super. Ct. (4 Sandf.) 5.
[13] Story, Bailments, § 237.

Mutuality of benefit—Degree of care.

(322) The court instructs the jury that if the plaintiff put the chattel in question into the possession of defendant at the request of defendant, and that any benefit, howsoever slight, thereby resulted to the defendant, then the bailment would not be for the sole benefit of the plaintiff, but would be a bailment for mutual benefit, and the duty of the defendant would not be discharged by the exercise of slight care, but it would be his duty to exercise ordinary care for the protection of the property.[14]

Hiring—Degree of care.

(323) The court instructs the jury that although they believe from the evidence, that the defendant borrowed from the plaintiff the mare in question, yet if they further believe that the defendant used the same care and diligence, and prudence, in taking care of the mare, the most prudent, careful man would take of his own property, placed under similar circumstances, then the jury will find for the defendant.[15]

(324) The court instructs the jury that if the jury believe from the evidence, that the mares in controversy were hired by H., the plaintiff, to B., the defendant, to be used by him, and that they were mutually benefited by the arrangement, then B. is only required to use such care as ordinary prudent men use with their property, in taking care of the mares; and if the jury further believe, from the evidence, one of the mares died, and that the defendant used such care and diligence in taking care of the mare, they will find for the defendant.[16]

(325) The court instructs the jury that if they believe from the evidence that after the mare in controversy had been sold and delivered by the defendant to the plaintiff, she was hired by the plaintiff to the defendant, and that the

[14] Vigo Agricultural Soc. v. Brumfield, 102 Ind. 146.

[15] Approved in Howard v. Babcock, 21 Ill. 259.

[16] Approved in Howard v. Babcock, 21 Ill. 259.

hiring was for the mutual benefit of the parties, then and in such case, the defendant is only required to use such care as ordinary prudent men take of their property, in taking care of the mare; and if the mare, while thus in the care and possession of the defendant, died, and that the defendant took such care of the mare, they will find for the defendant.[17]

Same—Want of knowledge on bailee's part.

(326) The court instructs the jury that if the plaintiff and the defendant made a contract by which the defendant hired the plaintiff's horse and carriage for use in driving for pleasure for a time and distance not fixed or agreed upon by them, the defendant rightfully drove the horse to Lynnfield and thence to Peabody, and was responsible for any injury to such horse or carriage, which was caused by the defendant's want of ordinary care and skill in driving or managing such horse and carriage in Peabody to be determined in view of the fact known by the plaintiffs and presumed to have been considered by them in letting the horse, that the defendant was a one-armed man; but was not responsible for any injury to such horse and carriage caused by the insufficiency of the plaintiffs' harness for driving or tying the horse, or by reason of any disease, or physical infirmity, or want of docility of the horse, or by any peculiar habits or dispositions of the horse when tied, unless the defendant was notified of such peculiar habits and dispositions.[18]

Same—Exceeding terms of the hiring.

(327) The court instructs the jury that if the plaintiffs and defendant made a contract, by which the defendant hired the plaintiffs' horse and carriage for use in driving to and from Lynnfield only, and in violation of that contract, the defendant drove the plaintiffs' horse and

[17] Approved in Howard v. Babcock, 21 Ill. 259.

[18] Approved in Perham v. Coney, 117 Mass. 102.

carriage to Lynnfield and from thence several miles to Peabody, he became thereby responsible to the plaintiff for any injury to such horse and buggy in Peabody or while driving from Lynnfield to Peabody. Whether or not such injury was caused by any want of ordinary care or skill of the defendant in driving the horse and carriage from Lynnfield to Peabody, or in tying or managing the horse and carriage in Peabody, or by any insufficiency of the harness of said horse, or any physical infirmity or want of docility of the horse, would be immaterial, as the defendant's use of the horse and carriage, in driving beyond Lynnfield in violation of his contract, was a conversion of such horse and carriage, in the nature of an original unlawful taking of such horse and carriage, at the time of the defendant's leaving Lynnfield, and such conversion caused the defendant to be liable in damages to the plaintiff therefor, equal to the difference between the value of such horse and carriage at the time it was taken by the defendant from Lynnfield, and the value of the same when restored by the defendant to the plaintiff. Accepting pay for the use of the horse under such a contract was a waiver of the conversion.[19]

(328) The hirer of a horse is bound to put it to no other use than that for which it is hired; and if he does so it amounts to a conversion, and he becomes liable for any injury that occurs after the conversion and while the horse is in his possession.[20]

(329) The court instructs the jury that if you believe from the evidence that the defendant hired the horse from the plaintiff to go to one or more particular places specified in the contract and that he went to another and a different place in a different direction and over a different route from what was specified in the contract, that would amount to a

[19] Approved in Perham v. Coney, 117 Mass. 102.

[20] Approved in Malone v. Robinson, 77 Ga. 719.

conversion of the horse; and if the horse died while in his possession and after he had converted it to his own use, he would be liable for the value of the horse at the time of the conversion.[21]

Same—Inevitable casualty.

(330) The court instructs the jury that if they believe, from the evidence, that the mare in question in this case, died from inevitable casualty, or by causes or under circumstances over which the defendant had no control, and could not prevent, then they will find for the defendant, unless they further believe that the defendant was guilty of negligence or carelessness.[22]

(331) The court instructs the jury if they believe from the evidence that the mare in controversy was borrowed by the defendant of the plaintiff, and that during the time she was so borrowed she died from some unavoidable accident, and the defendant used such care as the most prudent take of theirs, without any carelessness on the part of the defendant, they will find for the defendant.[23]

Skill of workman.

(332) The court instructs the jury that if the jury find from the evidence that plaintiff undertook (to do certain work for the defendant upon the chattel in question belonging to defendant or "undertook to manufacture for defendant certain articles from materials to be furnished by defendant") and if they further find that plaintiff did the work unskillfully, and that it was so badly and improperly done that the thing produced totally failed of being of any use or value, or that it was wholly inadequate for the purposes for which it was designed, then plaintiff cannot recover any compensation for his work. If, however, the

[21] Approved in Malone v. Robinson, 77 Ga. 719.
[22] Approved in Howard v. Babcock, 21 Ill. 259.
[23] Approved in Howard v. Babcock, 21 Ill. 259.

thing produced has some value, but the jury find that it was imperfectly and ineffectually done, then plaintiff may recover for his services such an amount as his work was reasonably and actually worth to the defendant under all the circumstances, but in no case can they allow the plaintiff's recovery to exceed the value of the services after deducting the amount of damage caused to the chattel (or materials) by being badly or unskillfully wrought upon by the plaintiff.[24]

(333) The court instructs the jury that a workman who undertakes to do work upon chattels for hire, is bound to bring to his services a degree of skill commensurate with the nature of the work, and he must use such reasonable skill as the particular work reasonably requires, and if the jury find from the evidence that the plaintiff delivered to the defendant (state the particular thing, as cloth to be made into a dress) without any instructions to defendant as to the method of doing the work thereon, the defendant is bound to exercise that degree of skill and care which a (state name of class to which artisan belongs,—as, dressmaker) would ordinarily possess or need to do the work in a reasonable and proper manner, and if the jury find that by reason of the failure to exercise such skill defendant improperly and negligently (state the particular thing done which is complained of, e. g. made up the dress with the cloth wrong side out) then the defendant is liable, and the plaintiff may recover for the injury caused by such unskillfulness.[25]

(334) The court instructs the jury that if they find from the evidence that the work which the defendant undertook to do was such as to ordinarily call for the personal skill of

[24] Grant v. Button, 14 Johns. (N. Y.) 377; Faxen v. Mansfield, 2 Mass. 147.

If the pleadings present an issue on defendant's counterclaim, an appropriate instruction should accompany the above.

[25] Lincoln v. Gay, 164 Mass. 537.

the person engaged to do it, or if they find as a fact that it was the understanding between the parties that the personal skill of the defendant should be devoted to the work, then the defendant had no right to employ another person to perform the work.

"Ordinary" or "reasonable" skill.

(335) The court instructs the jury that the "ordinary skill" or "reasonable skill" required of one who undertakes to perform work of a particular kind upon the chattels of another for hire, is only such skill as ordinarily skilled workmen, in the same kind of work would exercise upon their own material under the same circumstances. Though the particular work undertaken is one of great delicacy or difficulty, and such as requires greater skill and training than other kinds of work, yet the term "ordinary skill" means only such skill as is reasonable to the proper performance of the work in question.

(336) Defendant, if you find that he undertook to do work on the plaintiff's (carriage) though generally bound to exercise ordinary skill with reference to the services which he undertook to do, is not liable if plaintiff employed him, knowing that he did not possess ordinary skill, or if the unsuitableness or defectiveness of the carriage resulted from the fact that the defendant followed the instructions of the plaintiff as to how the work should be done.

Delegation by bailee.

(337) The court instructs the jury that if the jury find from the evidence that the defendant undertook for a reward to deliver the team of horses and vehicles attached and described in the evidence, to a person designated by the plaintiff, and in the course of this undertaking, intrusted the driving of the team to one who by his negligence permitted the horses to run away, whereby the plaintiff suffered damage, then the plaintiff is entitled to recover, and the jury

will allow such damages as they may find from the evidence the plaintiff suffered by reason of the defendant's fault in the premises.[26]

Contributory negligence of bailor.

(338) The court instructs the jury that a good defense is made out if the facts show that the plaintiff was himself negligent in any matter connected with the placing of the goods in the defendant's custody and if such negligence by the plaintiff contributed to or was part of the cause of the loss or injury complained of.[27]

Same—Knowledge that bailee was careless.

(339) The court instructs the jury that if they find from the evidence that the plaintiff loaned (here state facts, e. g. his horse to defendant) for defendant's sole benefit, and without reward, and that the plaintiff knew at the time that (state facts, e. g., the horse was high spirited and hard to control, and also knew that defendant was youthful and was rash and inexperienced and was not a competent driver or capable of controlling said horse), then the defendant is chargeable only with such degree of diligence as might reasonably be expected of a like person under like circumstances, and the plaintiff in such case cannot insist upon the diligence or prudence which is to be expected of a very thoughtful and experienced (driver).[28]

Same—Furnishing bad materials to workman.

(340) The court instructs the jury that it was the duty of the (plaintiff, the bailor), to furnish good and suitable material to the (defendant, bailee) in order that the work may be properly done, and also to provide needful materials or to furnish sufficient funds with which to purchase the

[26] Approved in American District Tel. Co. of Baltimore City v. Walker, 72 Md. 454.

[27] Parker v. Union Ice & Salt Co., 59 Kan. 626; McAllister v. Simon, 27 Misc. Rep. 214.

[28] Story, Bailments, § 237.

same, and if by reason of the (plaintiff's) failure or omission in any of these respects the article produced is improper, unsuitable or defective for the purpose for which it was intended, then the plaintiff must bear his own loss.

Bailor's liability—Letting dangerous chattel for hire.

(341) The court instructs the jury that if the (vehicle in question) was dangerous, or was such as might in its use be dangerous, and that the plaintiff let it for hire, knowing of the danger, or if by exercising a high degree of diligence he might have known, and if the jury find from the facts that although he so knew or might have known, yet he gave to the hirer no notice of the dangerous character of the (vehicle), and the hirer used such (vehicle) without being aware of the danger, and was by reason of the dangerous character of the (vehicle) injured in the using of it, then plaintiff is liable.[29]

Same—Unfit animals.

(342) The court instructs the jury that if you find from the evidence that the plaintiff hired his mare to the defendants for the purpose (of being used on the street railroad of the city of Fort Wayne), the plaintiff thereby engaged and bound himself that the mare so hired was reasonably fit and suitable for such purposes and such uses. If, therefore, you find that the mare so hired was injured while in the use of the defendants in pulling their street cars, without their fault, and through the nervousness and fretfulness of said mare, or because of her diseased condition at the time the plaintiff hired her to the defendants, or because of her unfitness to pull said street cars, then you should find for the defendants.[30]

[29] Moriarty v. Porter, 49 N. Y. 107, 23 Misc. Rep. 536.
[30] Approved in Bass v. Cantor, 123 Ind. 444.

Same—Bailee continuing to knowingly work unfit animal.

(343) The court instructs the jury that, although it is true that, by hiring his mare to the defendants for (use on the street cars), the plaintiff impliedly engaged that she was reasonably fit for that purpose, this gave the defendants no right to use her after it became manifest to them that by reason of her nervousness, or fretfulness, or diseased condition, she was not fit for such work. They had no right to use her. If her board devolved upon them, it was their duty to supply her with plentiful food and water at the proper time. It was their duty, also, not to require her to do more work than it was manifest she could perform without injury, and if, during such use, it was plainly evident to the defendant's employees that she was exhausted, overheated, or suffering by reason of disease, and her continued use was dangerous to her health and life, it was their duty then to abstain from further use of her without obtaining the plaintiff's consent to the same; and if, without so doing, they negligently persisted in such use, and by reason of the same she was so injured that she died, the defendants are liable.[31]

Contracts limiting or defining liability.

(344) The court instructs the jury that (plaintiff,—bailor) and the (defendant,—bailee)[32] had a legal right to fix, by the terms of their contract, the degree of liability which the defendant shall sustain, and to limit or reduce the degree of care or diligence which he should exercise in respect to the property delivered to him, except, however, that the defendant cannot be in this manner excused from

[31] Approved in Bass v. Cantor, 123 Ind. 444.

[32] If there is evidence offered tending to show that the bailment was one of the exceptional bailments, as that of an innkeeper or carrier, insert,—unless you find from the evidence that the bailee was an innkeeper (or carrier), within the meaning of other instructions given by the court. Then see that requests are made defining those exceptional bailments.

loss resulting from his own fraud or gross negligence. If the jury shall find as a matter of fact that they did so contract, then the defendant will be liable only for (state the legal substance of the contract).[33]

(345) The court instructs the jury that if the jury find from the evidence that defendant was conducting an exhibition of animals, and if they further find that plaintiff delivered the animals in question to defendant's care and entered the animals under the rules of the association, and that such rules provided that the entry should be at the owner's risk, and that animals entered should be cared for and returned at the close of the exhibition, and that the defendant would exercise all reasonable vigilance in caring for animals exhibited, but would not be responsible for loss by fire or otherwise, then the duty of defendant was to exercise ordinary care, and if the jury finds that the loss of the animal in question occurred by reason of the want of such ordinary care, then the defendant will be liable notwithstanding the condition in its rules against responsibility for loss.[34]

Termination of gratuitous bailment—Rights and duties.

(346) The court instructs the jury that while a gratuitous bailee has no right to the possession of the property as against the bailor, yet the bailor can not demand its redelivery at an unreasonable time or in an unreasonable manner whereby the bailee will necessarily sustain injury.

(347) The court instructs the jury that (defendant) if you find that he received (plaintiff's) chattels without hire and for the (plaintiff's) benefit should, when he desired to terminate his liability, have notified the (plaintiff) to take the chattels away, and if after such notice the (plaintiff) neglected to take them away within a reasonable time, or if he

[33] Alexander v. Greene, 3 Hill (N. Y.) 9; Id., 7 Hill (N. Y.) 533; Wells v. Steam Navigation Co., 2 N. Y. (2 Comst.) 204.

[34] Moeran v. New York Poultry, etc., Ass'n, 28 Misc. Rep. 537.

could not be found by due inquiry, then the (defendant) should have stored the chattels at the (plaintiff's) risk and charge.[35]

(348) The court instructs the jury that if they find from the evidence that defendant (bailee) performed his services gratuitously, and if they further find that after offering to deliver back the goods and making tender of them to the (plaintiff-bailor) that the (plaintiff) did not accept them, then defendant was not obliged to longer retain the custody of the goods, and is not liable for any loss which may have resulted from his placing them in the street.[36]

Surrendering chattels to third person.

(349) The court instructs the jury that (defendant, bailee) may excuse his failure to deliver the property back to the plaintiff on demand, by showing that the property was taken from defendant, and out of his custody by the authority of valid legal process, and that within a reasonable time he gave notice of the fact to the plaintiff, but if the property in custody of a defendant was demanded by third persons under color of process, it became the defendant's duty to ascertain whether the process was such as legally required him to surrender the property, and if it was not, then it was his right and duty to refuse to surrender the property and to offer such resistance to the taking of it, and to take such measures for the reclaiming of it, if taken despite his resistance, as a prudent and intelligent man would if the property had been demanded and taken under a claim of right to it by another person acting without legal process. It is not sufficient that defendant merely made a formal protest against the taking of the property under the process.[37]

[35] Change words in ( ) to suit. Bale v. Brinckerhoff, 7 Daly (N. Y.) 45.

[36] Babcock v. Gill, 10 Johns. (N. Y.) 287; Raulston v. McClelland, 2 E. D. Smith (N. Y.) 60.

[37] Roberts v. Stiverson, 123 N. Y. 65.

Compensation and lien.

(350) The court instructs the jury that though there was no express agreement for a compensation or for lien to secure the same, yet if (defendant, the bailee) has bestowed any service upon the chattels bailed to him, and under such circumstances as would naturally give rise to an inference of an understanding that such services should be paid for, the law will presume in that case that there was a promise to pay what the services were reasonably worth, and (defendant, the bailee) in such case may retain the goods in his custody until such compensation is paid.[38]

Same—Waiver.

(351) The court instructs the jury that notwithstanding (plaintiff, the bailee) may have parted with the possession of the chattels, yet, unless he voluntarily surrendered them to (defendant, the bailor), the lien is not divested; and (if the plaintiff's possession was disturbed by a taking of the goods on execution process against a third person, the lien is not lost even though the plaintiff afterward, for hire, assisted in removing the goods).[39]

Burden of proving negligence.

(352) The court instructs you that the burden of proving facts sufficient to show negligence on the defendant's part is upon the plaintiff; but it is sufficient that the facts be such that from them you can infer negligence and if at the time when the bailment was to terminate the defendant inexcusably refused to return the goods or returned them in a damaged condition then defendant must disprove the inference of negligence thereupon arising or must show that by reason of an act of God or of the public enemy or of an inevitable

[38] Burdick v. Murray, 3 Vt. 302, 21 Am. Dec. 588.

[39] Moore v. Hitchcock, 4 Wend. (N. Y.) 292. In this case the goods were levied on and taken from the bailee's possession and the bailee, for hire as a servant of the levying creditor, assisted in removing the goods. It was claimed that he waived his lien.

accident the loss occurred despite the exercise of all due care by defendant.[40]

Evidence—Admissions.

(353) The court instructs the jury that any admissions that may have been proved to have been made by plaintiff, are proper for the jury to consider in forming their verdict, and the jury will give any admissions, if any thus proved, such weight as they may think them entitled to.[41]

CHAPTER XXII.

BANKING.

I. In General.

Authority to certify check, 354.
Authority of paying teller to certify check, 355, 356.
Effect of certification of check, 357.
Effect of certification of check obtained with design to defraud bank, 358.
Right of the bank to retain funds to meet certified check, 359.
Duty of bank to retain funds for payment, 360.
Diligence in collection of drafts, 361.
Refusal to pay check—Effect of conspiracy to secure more than amount of deposit, 362.
Implied authority of cashier to draw funds of the bank on check for his personal benefit, 363.
Rights of bank on payment of forged check, 364.
Rights of bank where depositor has received benefits of a check signed by another in his name, 365.
Liability of bank on account of certificates of deposits sent to it for collection, 366, 367.

II. Liability for Receipt of Deposits when Insolvent.

Elements of offense, 368, 369.
Necessity of receiving officer having notice of insolvency, 370.
Manner of determining question of insolvency, 371-376.

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[40] Claflin v. Meyer, 75 N. Y. 262.
[41] Approved in Howard v. Babcock, 21 Ill. 259.

Same—Effect of stringency in the money market, 377.
Burden of proof, 378.
Previous good character of defendant, 379.

I. In General.

Authority to certify check.

(354) The court instructs the jury that unless they find from the evidence that J., the person whose name appears on the face of the writing offered by the plaintiff, was authorized or held out to the public by the defendant company as being authorized to certify or mark "good" writings or checks of the character of the paper sued on by plaintiff, they will find for the defendant, and the court states to the jury that the fact that the said J. signed himself as the "teller" or was designated or called "teller" or "paying teller" of the defendant company, is not of itself sufficient to justify the conclusion that the said J. was clothed with any such authority.[1]

Authority of paying teller to certify check.

(355) The court instructs the jury that if they find from the evidence that the checks were certified by the paying teller of the defendant company and if they further find from the evidence that said certifications were made in the general course of the defendant's business, and if they further find that plaintiff, in good faith, dealt with said defendant company on the basis of said course of business, and if they further find from the evidence that the officers of defendant knew of said course of business, then defendant will be bound by the act of its paying teller in making the certification of the check sued on.[2]

(356) The court instructs the jury that plaintiff is not required to prove that defendant's paying teller had actual

[1] Approved in Muth v. St. Louis Trust Co., 94 Mo. App. 94, 4 Bank. Cas. Ann. 416.

[2] Approved in Muth v. St. Louis Trust Co., 94 Mo. App. 94, 4 Bank. Cas. Ann. 416.

authority conferred upon him by defendant to certify checks, but that plaintiff had the right in good faith to rely upon the apparent authority of said paying teller to certify checks. And the court further instructs you that whenever a person has held out another as his agent authorized to act for him in a given capacity, or has knowingly and without dissent permitted such other to act as his agent in such capacity, or where his habits and course of dealing have been such as to reasonably warrant the presumption that such other was his agent, authorized to act in that capacity, whether it be in a single transaction or in a series of transactions, his authority to such other to act for him in that capacity, will be conclusively presumed, so far as may be necessary to protect the rights of third persons who have relied in good faith, and in the exercise of reasonable prudence, and the principal will not be permitted to deny that such other was not his agent authorized to do the act that he assumed to do, provided that act was within the real or apparent scope of the presumed authority.[3]

Effect of certification of check.

(357) The court instructs the jury that the indorsement on the face of the check sued on is in proper form to constitute a certification thereof; and further instructs you that if you find from the evidence that J., defendant's paying teller at the time of making said endorsement had authority or apparent authority as defined in these instructions to make the indorsement of certification upon said check, and if you find further from the evidence that plaintiff acted in good faith and without fraud as defined in another instruction herewith given then your verdict must be for the plaintiff.[4]

[3] Approved in Muth v. St. Louis Trust Co., 94 Mo. App. 94, 4 Bank. Cas. Ann. 416.

[4] Approved in Muth v. St. Louis Trust Co., 94 Mo. App. 94, 4 Bank. Cas. Ann. 416.

Effect of certification of check obtained with design to defraud bank.

(358) The court instructs the jury that if they find from the evidence that the writing or paper sued upon by the plaintiff was marked or certified "good" in the name of the defendant by an employee, and that the plaintiff obtained such marking or certification in pursuance of a design or plan to defraud the defendant by keeping or secreting said paper for such time as might be necessary to permit the money represented by such paper to be drawn out upon other orders, writings or checks, with the intention of then presenting the said writing, and demanding payment of the amount ordered therein to be paid, the jury will find for the defendant.[5]

Right of the bank to retain funds to meet certified check.

(359) The court instructs the jury that if they find from the evidence that the check sued on was certified by the authority of the defendant company, and that at the time of said certification there was sufficient funds of the maker of said check on deposit with defendant to pay said check, then defendant had the right to retain out of the funds of said maker a sufficient amount to pay said check whenever same might be presented.[6]

Duty of bank to retain funds for payment.

(360) The court instructs the jury that if they find from the evidence that at the time the check sued on was presented to defendant for certification, there was sufficient funds of the drawer on deposit with the defendant to pay the same, that it became the duty of the defendant to retain the said funds to pay said check, provided the jury finds from the

[5] Approved in Muth v. St. Louis Trust Co., 94 Mo. App. 94, 4 Bank. Cas. Ann. 416.

[6] Approved in Muth v. St. Louis Trust Co., 94 Mo. App. 94, 4 Bank. Cas. Ann. 416.

evidence that defendant's teller had authority to certify said check.[7]

Diligence in collection of drafts.

(361) The court instructs the jury that, if they believe the facts stated in the agreed statement, and also from the evidence in the cause that the plaintiff transmitted to the defendant as its correspondent in B., for collection the bill of exchange for $——, dated the 29th of October, 19—, which has been offered in evidence, and that the defendant, as such correspondent, received and undertook and assumed to collect the same on the morning of the 30th of October, 19—, and placed it in the hands of the witness H. for that purpose, and that said H. was an officer or agent of the defendant, and that said H. presented said bill of exchange to the said J. L. & Co., about one o'clock in the afternoon of the 30th of October, 19—, and that the said J. L. & Co., on whom the same purports to have been drawn, were then in doubtful credit, and that the said H. then received from the said J. L. & Co., for said bill of exchange and other claims also in the hands of the defendant, the check on the M. Bank for $—— which had been offered in evidence, and gave up said bill of exchange to J. L. & Co., and that the latter marked said bills as canceled, and that the said M. Bank was at that time within the same square with the banking house of the said J. L. & Co., and that the banking house of the defendant is several squares off from the latter and that the said check would have been paid by the M. Bank if it had been presented any time between one and two o'clock in the said afternoon of the 30th of October, 19—, and that said check was taken by the said H. to the defendant, and the amount thereof placed by it to the credit of the plaintiff, and that the payment of said check was not demanded until a few minutes before or after three o'clock in the afternoon of the 30th of October,

[7] Approved in Muth v. St. Louis Trust Co., 94 Mo. App. 94, 4 Bank. Cas. Ann. 416.

19—, and if they shall also believe that at the time last mentioned there was a usage among the banks of the city of B. as between them and their correspondents abroad to get checks received for sight bills of exchange, when said checks were drawn by houses or individuals of doubtful credit paid or endorsed "good" before taking them back to the banks holding them for collection, then the plaintiff is entitled to recover in this action the amount of said bill of exchange; provided that the jury find that the defendants in failing to have the said checks presented for payment or to be endorsed as good by the M. Bank before three o'clock on the 30th of October, 19—, were guilty of a want of due care, skill, and diligence in their employment as collectors of the said bill of exchange, and that they also find that the said check if it had been presented for payment between the hours of one and two o'clock on that day, would have been paid by the M. Bank and the said draft collected.[8]

Refusal to pay check—Effect of conspiracy to secure more than amount of deposit.

(362) The court instructs the jury that if they find from the evidence that the plaintiff and one M., his brother, confederated or conspired together to defraud the defendant by placing it in such a position that it might be called upon to pay the amount of the writing or check sued upon by plaintiff, after having already paid out upon other orders or checks the money to the credit of the drawer or drawers of such order or check, and that the plaintiff is in possession of the instrument sued on, as a party to such confederacy or conspiracy, the jury will find for the defendant.[9]

[8] Approved in Merchants' Bank of Baltimore v. Bank of Commerce, 24 Md. 12.

[9] Approved in Muth v. St. Louis Trust Co., 94 Mo. App. 94, 4 Bank. Cas. Ann. 416.

Implied authority of cashier to draw funds of the bank on check for his personal benefit.

(363) The court instructs the jury that the general authority of the cashier as general agent of the bank to draw drafts or checks on the bank in the conduct of its business, does not by itself permit him to draw such drafts or checks in payment of his personal debts or to raise money for the transaction of his personal business. When therefore, as in this case, he draws a draft or check on the bank, payable to his own order and for his individual debt, the party acting thereon takes the risk that the agent or cashier may act without authority to do so, and if it appears that the agent had repeatedly done such acts, on previous occasions and such acts had been ratified and not repudiated by the officers of the corporation, then providing such acts have been done for a period of time sufficiently long to establish a settled course of business, it may be inferred from the general manner in which they have been done that such acts were known or ought to have been known by the directors and that the cashier had authority to do such acts, if that be shown, the bank is liable. Authority to make such personal use of funds of the bank may be shown therefore by long-continued doing of such acts under such circumstances as warrant the inference that the acts were known or authorized by said bank, that is, authority of the cashier may be inferred from the power he was accustomed to exercise without the dissent of the bank and with its acquiescence.[10]

Rights of bank on payment of forged check.

(364) The court instructs the jury that if they believe from the evidence that the check for ——— dollars dated ——— day of ———, 19—, drawn on the ——— National Bank signed ———, and afterwards paid by the defendant was in fact signed by the plaintiff ——— or by one for her

[10] Gale v. Chase Nat. Bank, 104 Fed. 214.

and with her consent or by her authority, they should find for the defendant.[11]

Rights of bank where depositor has received benefits of a check signed by another in his name.

(365) The court instructs the jury that if they believe from the evidence that the check for ——— dollars dated ——— day of ———, 19—, drawn on the ——— National Bank signed ——— was paid by the defendant and that plaintiff with knowledge thereof received the proceeds of said check or the same was deposited to the plaintiff's credit in the ——— Bank and the same was drawn out of said bank by her or by her order or authority, then the jury should find for the defendant, even though they believe from the evidence that plaintiff did not actually sign such check or authorize another to sign the same for her.[12]

Liability of bank on account of certificates of deposits sent to it for collection.

(366) The court instructs the jury if the jury believe, from the evidence, that the ——— Bank received the proceeds of the certificates of deposit sent by plaintiffs, and credited the plaintiffs with the same, the relation of debtor and creditor is created between the defendants and the plaintiffs, so far as to require the payment to plaintiffs of the same funds in which the certificates were payable, on the demand of the plaintiffs.[13]

(367) The court instructs the jury, that if they believe, from the evidence, that the plaintiffs sent the certificates of deposit, given in evidence, to the defendants for collection, which were collected by the defendants, and there was no express or implied agreement as to the relation which should exist between the parties—that no agency was created as to

[11] Phoenix Nat. Bank v. Taylor, 23 Ky. Law Rep. 2307.

[12] Phoenix Nat. Bank v. Taylor, 23 Ky. Law Rep. 2307.

[13] Approved in Marine Bank of Chicago v. Rushmore, 28 Ill. 463.

the funds collected, except to collect the certificates in the funds in which they were payable, and to hold the same subject to demand of the plaintiffs.[14]

II. Liability for Receipt of Deposits when Insolvent.

Elements of offense.

(368) The court instructs the jury if the jury believe from the evidence that on ———, 19—, the witness, V. did deposit in the ——— Bank, a banking institution doing business in the state of ———, at the county of ———, $———, or any part thereof to the value of $30 or more, lawful money of the United States, of the money and property of the witness, V., and shall further believe, from the evidence that the said deposit was not taken and received by the defendant himself, but was taken and received by some other person, but that such person was then and there in the employ of the said ——— Bank, and acting under the direction and control of the defendant in employment, but that such other person had general power and authority from the defendant to receive deposits of money into said bank and that said bank was then and there in failing circumstances, and the defendant had knowledge that said bank was then and there in failing circumstances, they will find the defendant guilty as charged.[15]

(369) The court instructs the jury that if you shall believe from the evidence that defendant at the county of J. and State of M., at any time within ——— years next before the —— day of ———, 19—, was the president of the ——— Bank, and that the same was a corporation and doing business as a banking institution in said county and state, and did then and there unlawfully and feloniously assent to the taking and receiving on deposit in said banking institution the money of V., to the amount of $—— or more and that

[14] Approved in Marine Bank of Chicago v. Rushmore, 28 Ill. 463.
[15] Approved in State v. Darrah, 152 Mo. 522.

said banking institution was then and there in failing circumstances and that the defendant was then and there the president of said banking institution doing business as such, and that the defendant had knowledge at the time when such deposit was received that said banking institution was in failing circumstances, you will find the defendant guilty and assess the punishment by imprisonment in the penitentiary for any time not less than ——— years and not more than ——— years.[16]

Necessity of receiving officer having notice of insolvency.

(370) The court instructs the jury that it is no offense for an officer of a bank to assent to the receipt of a deposit by such bank, when the same is in failing circumstances, and if at the time of receiving such deposit, the officer did not at the time know it was in failing circumstances, but in taking into consideration the question as to whether or not the bank in question was in failing circumstances on the ——— day of ———, 19—, and as to whether or not the defendant had knowledge on that day of its condition, you may consider all the facts and circumstances in evidence before you.[17]

Manner of determining question of insolvency.

(371) The court instructs the jury that it is not of itself a crime for the president of a bank to borrow money from the bank of which he is president, and you can consider the fact that the defendant borrowed money from the bank in question, if you find he was president of the bank and did borrow money from the bank, in determining the condition of the bank on the ——— day of ———, 19—, and for no other purpose.[18]

[16] Approved in State v. Darrah, 152 Mo. 522.

"Feloniously" as used in these instructions means wickedly, and against the admonition of the law; unlawfully.

[17] Approved in State v. Darrah, 152 Mo. 522.

[18] Approved in State v. Darrah, 152 Mo. 522.

(372) The court instructs the jury that in considering the condition of the bank on the ——— day of ———, 19—, you will not take into account the $——— of capital stock as a liability.[19]

(373) The court instructs the jury that in determining the condition of the ——— Bank on the ——— day of ———, 19—, you should consider the reasonable market value of the assets of the bank on hand as compared to its liabilities on that day; all consideration of the condition of the bank is confined to the ——— day of ———, 19—, but you may consider any evidence that may be before you showing its condition immediately before that day, if there is any such, to aid you in determining its condition on that day.[20]

(374) The court instructs the jury that in determining the question of whether or not the ——— Bank, was in failing circumstances on the ——— day of ———, 19—, you should consider the liabilities of the bank and the reasonable market value of the assets of the bank on that day regardless of any change, if any, or additional security, if any, which may have been given, since that day. If you shall find from the evidence that any part of the assets of said bank have been proven to have a market value, then you should give such assets such intrinsic value as may have been shown by the evidence in the case, and if there be any of said assets, to wit: stocks, bonds or negotiable paper, that have not in your opinion, from the evidence, been shown to have a market value, nor an intrinsic value, then such assets are presumed to be worth their face value. This will have no application to such assets as may have been shown by the evidence to have no value at all, provided there is such evidence as to any of the assets of said bank.[21]

(375) The court instructs the jury that in determining

[19] Approved in State v. Darrah, 152 Mo. 522.
[20] Approved in State v. Darrah, 152 Mo. 522.
[21] Approved in State v. Darrah, 152 Mo. 522.

the value of any of the assets of the ——— Bank on the ——— day of ———, 19—, as shown on this trial, the testimony of expert witnesses who have testified before you, if deemed by you unreasonable, may be disregarded.[22]

(376) The court instructs the jury that in determining the question as to the condition of the bank on the ——— day of ———, 19—, you will consider the assets and their reasonable market value on that day, and without any reference to any indorsement of any of the notes made after the ——— day of ———, 19—.[23]

Same—Effect of stringency in the money market.

(377) The court instructs the jury that a banking institution is in failing circumstances, when it is unable to meet the demands of its depositors in the usual and ordinary course of business, and this is true even though you shall believe that there was at the time a stringency in the money market.[24]

Burden of proof.

(378) The court instructs the jury that although by the statute the failure of the ——— Bank is made prima facie evidence of the knowledge on the part of the defendant that the same was in failing circumstances on the ——— day of ———, 19—, yet the burden of proving the state's case is not really changed. The law enables the state to make a prima facie case by proof of assenting to the creation of state indebtedness and the reception of the money into the bank, but the defendant can show the condition of the bank and the circumstances attending the failure and any facts tending to exonerate him from criminal liability; then on the whole case, the burden rests on the state to establish defendant's guilt beyond a reasonable doubt. The presumption of inno-

[22] Approved in State v. Darrah, 152 Mo. 522.
[23] Approved in State v. Darrah, 152 Mo. 522.
[24] Approved in State v. Darrah, 152 Mo. 522.

cence with which defendant is clothed and never shifts, rests with him throughout the case, notwithstanding a prima facie case may have been made out by the state.[25]

Previous good character of defendant.

(379) The court instructs the jury that in determining as to the guilt or innocence of the defendant, you should take into account the testimony in relation to his character for honesty, integrity, and veracity, and you should give to such testimony such weight as you deem proper, but if, from all the evidence before you, you are satisfied beyond a reasonable doubt, as defined in these instructions, that the defendant is guilty, then his previous good character, if shown, cannot justify, excuse, palliate or mitigate the offense and you cannot acquit him merely because you may believe he has been a person of good repute.[26]

CHAPTER XXIII.

BETTING AND GAMING.[1]

Elements of offense of keeping a gambling house, 380.
Gambling device must be actually used, 381.
Billiard table a gambling device, 382.
Lawful money must be staked, 383.

Elements of offense of keeping a gambling house.

(380) The court instructs the jury that the defendant is charged with keeping a certain gaming table commonly called a faro-bank. Section 230 of the "Act concerning Crimes and Punishments," is the one under which this case is presented. Every person who shall set up or keep any table or gambling device commonly called A. B. C. faro-bank, E. O.

[25] Approved in State v. Darrah, 152 Mo. 522.
[26] Approved in State v. Darrah, 152 Mo. 522.
[1] See Criminal Law for instructions applicable to crimes generally.

roulette, equality, or any kind of gambling table, or gambling device, adapted, devised, and designed for the purpose of playing any game of chance, for money or property, and shall induce, entice, or permit any person to bet, or play at or upon any such gaming table or gambling device, or at or upon any game played at or by means of such table or gambling device, or on the side or against the keeper thereof, shall, on conviction, be adjudged guilty of a misdemeanor, and punished by imprisonment in a county jail, not exceeding one year, and by fine not exceeding one thousand dollars. The defendant is presumed to be innocent of the offense charged, and before you are warranted in a verdict against him, each one of the facts which go to make up the offense charged, which are essential parts of the offense, as set forth in the indictment, must be established by the testimony introduced before you, to your satisfaction beyond any reasonable doubt. The transaction complained of must have taken place within the limits of this county to give jurisdiction to this court, and within two years prior to the commencement of this prosecution, December 9, 1864, to avoid the statute of limitations. It must appear from the testimony, 1st. That at the place mentioned by the witness a gambling device or instrument was in existence. 2d. That that gambling device was what is generally known as a faro-bank. 3d. That the defendant was the keeper of that faro-bank. To establish the fact of one being the keeper of a faro-bank, it is sufficient to show that he appeared thus acting as the one having control, in charge, superintending the same. It is not necessary to show that he was actually the owner. 4th. That the defendant being the keeper, kept such gambling device for the purpose of gain. 5th. That defendant being the keeper and keeping the said device for purposes of gain, induced or permitted other persons to bet and play upon such gambling device either on his side or against him.[2]

[2] Rice v. State, 3 Kan. 141.

Gambling device must be actually used.

(381) The court instructs the jury that unless they believe from the evidence that money or other property was actually bet and lost upon such gambling device, alleged in said indictment, they cannot find the defendant guilty under said indictment. The mere keeping such a device, commonly called faro-bank, in the defendant's house or room, is no offense under the statute. The setting up of a gambling device or table, called faro-bank, is no offense under the statute on which the indictment is found, unless a game be played, and money or property bet. Simply setting out a table, or putting upon it a pack of cards, would not be setting up a gaming table or faro-bank. Where the statute speaks of a gaming table or device for a particular purpose, it is not within the act, unless the possessor of it intends to employ it for that purpose.[3]

Billiard table a gambling device.

(382) The court instructs the jury that if they believe from the evidence that the defendant played at the game commonly called pool, by means of a billiard table, and that at such game of pool so played money or property was bet, won or lost, such game so played would be in law a game of chance; and if such game was so played upon a billiard table, as charged in the indictment, such billiard table did thereby become in law a gambling device.[4]

Lawful money must be staked.

(383) If the state fails to satisfy the jury from the evidence that property was bet at said game of faro, but does satisfy the jury from the evidence that notes or bank-bills, or checks were bet at said game; yet this would not be sufficient under the statute to establish that money was bet on a game of chance. The term "money" has a technical mean-

[3] Rice v. State, 3 Kan. 141.

[4] State v. Jackson, 39 Mo. 420.

ing, and means nothing but lawful money of the United States. And the state must by legal evidence establish to the satisfaction of the jury, that legal or lawful money was bet at the game of faro.[5]

CHAPTER XXIV.

BIGAMY.*

Elements of offense, 384.
Cohabitation under second marriage unnecessary, 385.
Belief in divorce a defense, 386.

Elements of offense.

(384) The jury are instructed that to constitute the offense charged it is necessary for the prosecution to establish beyond a reasonable doubt that defendant contracted a legal marriage with A. B. and that thereafter while she was living and undivorced from him he contracted a marriage with C. D. which would have been legal had it not been for the existence of such prior marriage.[1]

Cohabitation under second marriage unnecessary.

(385) The jury are instructed that if they believe from the evidence that defendant having a lawful wife living contracted a marriage with C. D. the offense was complete when such marriage was solemnized and it is not essential that he should thereafter have cohabited with her.[2]

Belief in divorce a defense.

(386) The jury are instructed that if they believe from the evidence that defendant was informed that his wife had obtained a divorce from him, and that he used due care and

[5] Rice v. State, 3 Kan. 141.

*See Criminal Law for instructions applicable to crimes generally.

[1] Davis v. Com., 13 Bush (Ky.) 318; Beggs v. State, 55 Ala. 108.

[2] Beggs v. State, 55 Ala. 108.

made due inquiry to ascertain the truth, and had, considering all the circumstances, reason to believe and did believe at the time of his second marriage that his former wife had been divorced from him they will find him not guilty.[3]

CHAPTER XXV.

BOUNDARIES.

Establishment of original survey in general, 387, 388.
Right to consider excess in survey, 389.
Meander lines, 390.
High-water mark as boundary, 391-393.
Location by parties, 394-398.
Same—Burden of proof, 399.
Acquiescence without agreement as to correctness, 400.
Whether declarations of prior owner as to location are binding on grantees, 401.

Establishment of original survey in general.

(387) The court instructs the jury that in your deliberations to determine the location of the land described in the M. patent, and whether or not it is included in the D. survey, you will search for the footsteps of the surveyor in locating the D. survey, and in this search you will be guided first by natural objects, second artificial objects, and then by course and distance; yet in this case you will investigate all the evidence and follow the actual survey of said D. as it was made, if in fact made by the surveyor, to decide said location of said land described in said M. patent with reference to the said D. survey.[1]

[3] Squire v. State, 46 Ind. 459.

Upon this proposition and the kindred one that a belief based on due inquiry into the death of the former wife is a defense the American cases are in conflict. That it is a defense, see Watson v. State, 13 Tex. App. 76; State v. Shank, 10 Wkly. Law Bul. (Ohio) 16. That it is not a defense, see Com. v. Hayden, 163 Mass. 453; State v. Armington, 25 Minn. 29.

[1] Approved in Mayfield v. Williams, 73 Tex. 508.

(388) The court instructs the jury that, in questions of boundary, natural objects called for, marked lines and reputed boundaries, well established should be preferred in ascertaining the identity of a tract of land to the courses and distances of the calls of the grant.[2]

Right to consider excess in survey.

(389) The court instructs the jury that, if there is any excess in quantity of land in the W. survey, such excess is not to be considered by the jury, whether the same be great or small, unless it enables or assists you to determine the true location of the south boundary line of the W. survey. You are required to find the true location of the line of the survey as originally run and located on the ground, retracing the footsteps of the original surveyor; and it does not matter whether a greater or less quantity of land than called for in the grant be included within the lines as originally run.[3]

Meander lines.

(390) The court instructs the jury that if you find from the evidence offered in this case that there existed at the time of the government survey and plat of the meander line of the reservation a quantity of upland between the meander line and the channel of ——— Creek covered with a natural growth of vegetation, and such tract of land was equal to or greater in area than the adjacent lots lying north of the meander line and claimed by plaintiff, then you may consider this fact as a circumstance tending to show that the meander line was intended as the south boundary of the lots claimed by plaintiff, regardless of the location of the creek. I instruct you that a meander line is a line run by the surveyor for the purpose of determining the sinuosity of the stream and the area of the lots; and where such line in fact

[2] Approved in Reusens v. Lawson, 91 Va. 226.

[3] Approved in Branch v. Simons (Tex. Civ. App.) 48 S. W. 40.

meanders the stream, under the laws of this state, the boundary of the lots described would be the center of the channel of the stream, and not the meander line as run on the shore. If, however, you find from the evidence in this case that there is a wide and material divergence between the meander line as run by the surveyor and the north bank of the stream, as it existed at the time of the survey, then I instruct you, as a matter of law, that the meander line as run by the surveyor upon the ground, and not the stream, should be taken as the southern boundary of the lots described in plaintiff's complaint.[4]

High-water mark as boundary.

(391) The court instructs the jury that the question as to what in law constitutes ordinary high-water mark is the leading question in this case. It therefore becomes necessary to define what the law regards as ordinary high-water mark: It does not mean the height reached by unusual floods, for these usually soon disappear. Neither does it mean the line ordinarily reached by the great annual rises of the river, which cover in places lands that are valuable for agricultural purposes, since the waters brought by these annual rises do not usually remain permanently, or for any great length of time, and crops may be raised on the soil as the water subsides. Nor yet does it mean meadow land adjacent to the river, which, when the water leaves it, is adapted to and can be used for grazing or pasturing purposes.[5]

(392) The court instructs the jury that trees may be included under the general head of vegetation, but trees which grow and flourish best in the immediate vicinity of running streams that are subject to overflow, and which shoot up in places as the water recedes, and which can withstand the ef-

[4] Approved in Barnhart v. Ehrhart, 33 Or. 274.

[5] Approved in Welch v. Browning (Iowa) 87 N. W. 430.

fect of water encompassing the lower part of their trunks without injury, and for a longer period than other kinds of trees, should not necessarily be classed as the kind of vegetation to which the law refers as marking the limit of ordinary high water in cases of the character such as the one now on trial, unless the soil on which they grow is adapted to and can be used for agricultural purposes, or so far removed from the effect of high water as to become permanent. You are to say from the evidence before you whether or not the trees mentioned and located in the testimony as growing upon the particular portion of the land, the character of which is, in this action, the subject of dispute, are or are not growing on soil upon which crops may be raised or grass grown suitable for meadow or pasturage, or are so unaffected by high water as to become permanent. It is for you to say, whether the soil upon which these trees grow and their location in respect to the river, can be used for agricultural purposes, such as the cultivation of crops or as meadow or not. So much of it as you may find susceptible of cultivation and the growing of crops would be above ordinary high-water mark, and not part of the river bed, as would also be groups of trees which have stood for many years unaffected by high water, and are permanently fixed in the ground.[6]

(393) The court instructs the jury that the line, then, which fixes the high-water mark is that which separates what properly belongs to the river bed from that which belongs to the riparian owner,—that is, the owner of adjoining land,—and is not the line reached by unusual floods, but that which is shown by the character and condition of the soil and vegetation to be the limit to which high water ordinarily reaches. Soil which is submerged so long or so frequently, in ordinary seasons, that vegetation will not grow upon it, may be regarded as part of the bed of the river which overflows it,

[6] Approved in Welch v. Browning (Iowa) 87 N. W. 430.

and consequently soil to the use of which the public have the same right that they have to waters of the river.[7]

Location by parties.

(394) The jury are instructed that it is perfectly competent for parties owning adjoining tracts of land to settle by agreement, where the division line shall be; and if the jury shall believe from the evidence that the plaintiff and defendant owned adjoining tracts of land, and any question or dispute had arisen as to where the line now in controversy was, and the plaintiff and defendant agreed upon the line and established it, as between themselves, then in that case it is wholly immaterial where a survey would put the line. Each party is bound by his agreement, and in determining whether there was such agreement and fixing of the line, it is competent for the jury to take into consideration acts and statements of the parties at the time, the acts done by each and the fixing and adjustment of fences and improvements by them, under such agreement, if any are proven.[8]

(395) The court instructs the jury that before you can find for defendant, on the issue that the survey in the lane dividing plaintiff's and defendant's field has been agreed upon as the division or boundary line between (the southeast quarter of the southeast quarter of section 28 and the northeast quarter of the northeast quarter of section 33,) you must be satisfied from the evidence, that there was a mutual agreement between the owners of the land to that effect. The fact that F., the former owner in section 33, erected the south line of fence along the lane and cultivated the lands on the south side of such lane, will not of itself alone, be sufficient to prove such consent and agreement. You are further instructed that in determining whether the land which divides the plaintiff's and defendant's property has or has not been

[7] Approved in Welch v. Browning (Iowa) 87 N. W. 430.

[8] Cutler v. Callison, 72 Ill. 113.

agreed upon between the former owners of adjacent property as the division or boundary line, it is proper that you take into consideration the long acquiescence of adjoining owners to such line of division.[9]

(396) The court instructs the jury that if you believe from the evidence, that the line claimed by plaintiffs, as surveyed by ——— is the correct line, then you will find for the plaintiffs, unless you further find that the land line as claimed by defendants was agreed upon as the land line by B. and R., and upon this latter proposition the defendants are required to produce the preponderance of the evidence before you can find for them on the alleged agreement.[10]

(397) The court instructs the jury that, in the absence of all controlling evidence, the true boundary would be a direct line from the end of one wall to the opposite wall; but that if the jury should be satisfied that, at the date of the deed, there was in fact a fence passing from wall to wall around the "jog," and should also be satisfied, from the acts of the parties to the deed, at the time of its execution and afterwards, that they understood and intended said fence as the true boundary between their lands, then the "jog" would not pass by the deed.[11]

(398) The court instructs the jury that if they believe from the evidence that the defendant before he made any erection or improvements upon the strip of land in controversy in this case, entered into an agreement with the plaintiff by which he procured ——— the surveyor to come and mark out the land and fix the boundaries between the land of the plaintiff and the land of defendant and that ——— came and laid out the line in the presence of plaintiff and

[9] Approved in Coleman v. Drane, 116 Mo. 387.

[10] Approved in Henderson v. Dennis, 177 Ill. 547. The objection that "land line" and "boundary line" used in this instruction were not synonymous was not seriously considered.

[11] Approved in Davis v. Sherman, 73 Mass. (7 Gray) 291.

defendant and with plaintiff's assent and concurrence, then the jury are instructed that this only does not change the rights of the parties because land cannot be conveyed by parol and nothing short of an acquiescence in the line thus located for ——— would have any effect to change the true line, but if the jury believe from the evidence that plaintiff and defendant got together and procured ——— to survey the line between the lands of plaintiff and defendant so as to determine where the defendant might safely build and the defendant did, in pursuance of such agreement and with knowledge and assent of the plaintiff locate his building and make valuable improvements, then the jury are instructed that plaintiff would be estopped from thereafter questioning the line so surveyed by ———.[12]

Same—Burden of proof.

(399) The court instructs the jury that while the owners of adjoining tracts of land may by parol agreement, settle and establish permanently a boundary line between their lands, which, when followed by possession and the making of improvements, will be binding and conclusive and cannot afterwards be disputed, such agreements must be proven by a preponderance of the evidence, and the agreement must be such as to operate as a settlement of what was unsettled.[13]

Acquiescence without agreement as to correctness.

(400) The court instructs the jury that acquiescence in a line without an agreement as to its correctness does not bind a party unless such acquiescence extends for more than twenty years.[14]

Whether declarations of prior owner as to location are binding on grantees.

(401) The court instructs the jury that the opinion on

[12] Approved in Corkhill v. Landers, 44 Barb. (N. Y.) 218.
Mem. Exceptions to this instruction were overruled.
[13] Approved in Henderson v. Dennis, 177 Ill. 547.
[14] Approved in Henderson v. Dennis, 177 Ill. 547.

supposition or verbal declarations of ——— as to where his true corner or lines were, cannot estop those claiming under him from claiming to the true boundaries of the grant described in the declaration, yet the jury may consider any such declaration as evidence tending to show what was the true boundary of the land described in the declaration.[15]

CHAPTER XXVI.

BROKERS.

I. Rights and Liabilities of Principal as to Third Persons.
Responsibility for mistakes of broker, 402.
Estoppel to deny authority, 403.

II. Liabilities Between Broker and Principal.
Liability of broker to principal for negligence, 404, 405.
Liability of principal for purchase price to brokers, 406.
Liability to broker on account of purchase and sale of stocks, wheat, etc., 407-412.
Liability of principal failing to advance purchase price of stock, 413-415.
Sale by brokers for delinquency in margins, 416-418.
Buying in to cover short sales—Notice to principal, 419.
Ratification of irregular sale by broker, 420.
Dealings of broker adverse to interest of principal, 421-423.

III. Right of Broker to Commissions.
Establishment of contract of employment, 424.
Performance of duty by broker, 425-428.
Necessity of procuring bargain or offer, 429.
Procuring cause of sale, 430, 431.
Actual negotiation by broker of final agreement or participation therein, 432.
Sales by employee of broker without disclosure of relation, 433.
Departure from original instructions of principal, 434.
Consummation of bargain, 435.
Failure of principal to consummate bargain, 436-441.

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[15] Reusens v. Lawson, 91 Va. 226.

Bargain effected by principal or others, 442-448.
Withdrawal of negotiations from control or management of broker, 449.
Sale to person, introduced by broker, by fictitious or intermediate transfer, 450, 451.
Fraud or bad faith of broker, 452.
Double commissions or employment, 453.
Right as to commissions in absence of express contract as to amount, 454, 455.

I. Rights and Liabilities of Principal as to Third Persons.

Responsibility for mistakes of broker.

(402) The court instructs the jury that this suit was brought by plaintiffs to recover the price of a car of iron sold to defendant and that defendant admits the liability for the iron but pleads a counterclaim for damages for an alleged failure on the part of plaintiffs to punch the iron in question in accordance with direction furnished to T., who the defendant says was the agent of the plaintiffs. Plaintiffs claim that T. was the agent of defendant and that they punched the iron as directed by T. The court instructs the jury that if they find in this case that the defendant first employed the broker, Mr. T. or first set him in motion on the business involved in this controversy, you are instructed that he was and remained the agent of the defendant so far as any agency resulted from the above facts, and that any mistakes which he may have made in conveying to plaintiff the directions of the defendant as to the manner of punching these rails, are mistakes of defendant's own agent and plaintiffs are not responsible therefor.[1]

Estoppel to deny authority.

(403) The court instructs the jury that if they believe from the evidence that A. was a broker, and apparently had the general charge of plaintiff's office, and that A. negotiated a sale of the plaintiff's goods as alleged in the declaration to the defendant without disclosing that he acted as broker only,

[1] Approved in Schlesinger v. Texas, etc., R. Co., 87 Mo. 149.

and the sale was made openly and in the presence of other parties in plaintiff's office, and if the jury believe from the evidence that A. subsequently had the possession of the evidences of the title to the property so sold, and that A.'s acts up to the time for payment of the price had been apparently ratified by the plaintiff, then the jury may find that defendant was justified in giving to A. a check drawn to plaintiff's order for the goods so purchased.[2]

II. Liabilities between Broker and Principal.

Liability of broker to principal for negligence.

(404) The court instructs the jury that a broker who takes collaterals for a loan of his principal's money, made by him without making inquiries or taking precautions which he could have taken to ascertain the genuineness or validity of the collaterals, is negligent.[3]

(405) The court instructs the jury that if they believe from the evidence that defendants (were employed as custom-house brokers by the plaintiff to enter imported goods as alleged in the declaration, and that the day before an increased duty came into effect, the custom-house was to be kept open until midnight instead of closing at 3 p. m. as was usual, to permit of the entry of goods then in port or arriving during the day, and if the jury believe from the evidence that plaintiff's goods were in port on such day, and that by the exercise of reasonable care the defendants could have ascertained that the custom-house was to be kept open until midnight, but failed to ascertain such fact and so lost the opportunity to enter the goods at the lower rate of duty, then the defendants will be liable in damages for the excess of duties which plaintiff was obliged to pay because of defendants' failure to ascertain the fact that the custom-house was to be kept open until midnight, if the jury believe from

[2] Talmage v. Nevins, 32 N. Y. Super. Ct. (2 Sweeny) 38.
[3] Isham v. Post, 71 Hun, 184, 54 N. Y. St. Rep. 232.

the evidence that plaintiff was obliged to pay more duty because of defendant's failure to ascertain such fact.)[4]

Liability of principal for purchase price to brokers.

(406) The court instructs the jury that if they believe from the evidence, that the plaintiff purchased the property described in the declaration, without disclosing to the vendor of the property the name of defendant for whom it is alleged he acted as broker, and that plaintiff was obliged to pay the amount of the purchase price to the vendor, and if the jury believe from the evidence that defendant had authorized the plaintiff to purchase the property and that plaintiff acted as broker for defendant in making the purchase, then plaintiff may recover the purchase price so paid from the defendant.[5]

Liability to broker on account of purchase and sale of stocks, wheat, etc.

(407) The court instructs the jury that if they find that the defendant ordered the plaintiffs as brokers to buy and sell wheat for him on commission according to the rules and custom of the market in which such orders might be executed, and if they find that in pursuance of such orders the plaintiffs through their agents, made purchases and sales of wheat for defendant in C. according to the rules and customs of that market, and if they find that the contracts of purchase so made were settled in good faith and according to the terms thereof and the usages and customs of said market, and that plaintiffs paid the loss resulting from such contract and received the profits and duly reported the same to the defendant, then the defendant became liable to account to the plaintiffs for the excess, if any, of the loss so paid by them on said transactions, over and above the profits received by them on the same and for such commissions of

[4] Vernier v. Knauth, 7 App. Div. (N. Y.) 57.

[5] Knapp v. Simon, 96 N. Y. 284, 6 Civ. Proc. R. (Browne) 1.

the plaintiffs for making said purchases and sales as the jury may find were agreed upon between the parties.[6]

(408) The court instructs the jury that if they find from the evidence that the defendant ordered the plaintiffs as brokers to buy and sell stocks and other securities for him in ——— and ——— markets on commission subject to the usages and rules of said markets, and if they find that in pursuance of said order the plaintiffs by their agents did buy and sell stocks and other securities in said markets in accordance with the rules and usages thereof and made reports of such purchase and sales to the defendant and that plaintiffs, by their agents, actually received and paid for the stocks and securities so purchased and actually delivered, and were paid for those so sold, then such purchases and sales were binding upon the defendant and he became liable to account to the plaintiffs for the excess that the jury may find they paid for stocks and securities so purchased by them, over and above the amount received by them for sales so made by them and for such commissions of plaintiffs for making said purchases and sales as the jury may find the defendant and plaintiffs agreed upon.[7]

(409) The court instructs the jury that if the jury find that the defendant employed the plaintiffs as his brokers to buy and sell on commission stocks, bonds and grain for him in the markets of ———, ——— and ———, under an agreement that the defendant should secure the plaintiffs by depositing with them a margin, as testified to by the defendant and if they find that plaintiffs through their agents executed said orders of the defendant in said markets as required, to be found in plaintiffs' third and fourth prayers,

[6] Approved in Stewart v. Schall, 65 Md. 289.

These to be considered in connection with those given for defendant.

[7] Approved in Stewart v. Schall, 65 Md. 289.

These to be considered in connection with those given for defendant.

according to the custom and usage of said markets and that plaintiffs paid all money necessary and required to be paid in the execution of such orders, and received all moneys that became receivable in the execution of such orders and that they reported all such transactions to the defendant and charged him with the money so paid for him and credited him with the money so received by them for him; and if they find that the defendant failed to secure the plaintiffs by keeping up said margin when required, and that the plaintiffs thereupon sold such securities of the defendant as they had in hand after notice to him in the manner shown in evidence and reported such sales to defendant, then the plaintiffs are entitled to recover the loss sustained by them in the execution of the defendant's orders as above set forth and their commissions for executing the same.[8]

(410) The court instructs the jury that if the jury find the facts stated in the plaintiffs' third, fourth and fifth prayers and further find that in the execution of the orders of the defendant therein referred to, the plaintiffs paid to the brokers employed by them, interest on the monthly balances due said brokers for the execution of said orders, and reported said payments, if entered to the defendant, and if they find that the custom and usage of the business in the markets where such orders were executed, was to charge interest on such monthly balances of accounts, then the plaintiffs are entitled to recover the interest so paid by them on account of the defendant.[9]

(411) The court instructs the jury that if they find from the evidence that on ———, 19—, the plaintiff authorized the defendants to buy wheat for him in quantities of (5,000)

[8] Approved in Stewart v. Schall, 65 Md. 289.

These to be considered in connection with those given for defendant.

[9] Approved in Stewart v. Schall, 65 Md. 289.

These to be considered in connection with those given for defendant.

bushels at a time whenever they bought at the same time and price (10,000) bushels for themselves, and not otherwise; and that plaintiff agreed to pay to defendants a commission of —— of one per cent. per bushel for all wheat so bought for him by them, and that defendants undertook and agreed that they would not buy (5,000) bushels for plaintiff unless they at the same time and price bought (10,000) bushels for themselves; and shall further find that defendants did thereafter on ———, 19—, and ———, 19—, respectively, buy for plaintiff (5,000) bushels of wheat and charged the same to plaintiff, and that they represented to plaintiff that they had on each of said occasions bought (10,000) bushels for themselves at the same time and price as that at which they bought for plaintiff; and shall find that the plaintiff, on the faith of such representation (should the jury find it to have been made) and in the belief that defendants had bought (10,000) bushels for themselves as aforesaid, paid to defendants on account of the purchase of and of the depreciation, when sold, in the value of said wheat bought as aforesaid for him (should the jury so find) the moneys testified to by plaintiff to have been paid; and shall further find that in fact the defendants did not upon either of the said occasions buy (10,000) bushels for themselves, then the plaintiff is entitled to recover the moneys so paid.[10]

(412) The court instructs the jury that the plaintiffs cannot recover in this case upon the dealings in grain between them and the defendant unless the jury shall find from the evidence all the following facts: 1st. That the defendant authorized said dealings. 2nd. That the purchase and sales authorized by him were actually and bona fide made. 3rd. That the grain directed by him to be bought was in fact bought by the authorized agent or agents of the plaintiffs in ——— and was in fact delivered by the seller or sellers to and accepted by said authorized agent or agents. 4th. That

[10] Approved in Burt v. Myer, 71 Md. 467.

the grain directed by the defendant to be sold was in fact sold by the authorized agent or agents of the plaintiff in ——— and was in fact delivered by such authorized agent or agents to the purchasers thereof.[11]

Liability of principal failing to advance purchase price of stock.

(413) The court instructs the jury that if they shall find from the evidence that the plaintiff was a stock-broker in B. and that the defendant, on ———, 19—, authorized him to purchase on his account —— shares of the ——— stock and shall find that the place where said stock was ordinarily bought and sold was at the ——— in ——— and shall further find that the plaintiff therefore actually purchased —— shares of said stock through his subagents Messrs. ——— stock-brokers in ———, and at a price not exceeding the price limited by the defendant and that the defendant did not supply the plaintiff with funds to make said purchase and that the plaintiff had funds and credit with his subagents, which were applied by them in making said purchase; and if they shall further find that the defendant on the next day after the purchase was informed of said purchase and that the plaintiff notified the defendant on ———, 19—, by letter addressed to him at his proper postoffice, that he was ready to deliver to him —— shares of ——— stock so purchased on his account, and that unless he came forward and paid for it, he, the plaintiff on or after ———, 19—, would sell said stock at the risk and cost of the defendant; and they shall further find, that the plaintiff had ready for delivery to the defendant such stock and that he did sell on ———, 19—, at the —— in ——— —— shares of said stock for and at the risk of said defendant and that after applying the whole proceeds of said sale, there was a loss upon the said original purchase, which said loss the plain-

[11] Approved in Stewart v. Schall, 65 Md. 289.

tiff did pay to his subagents, then the plaintiff is entitled to recover the amount of said loss or the difference in price, together with his reasonable commission for the purchase and the expense of said resale.[12]

(414) The court instructs the jury that if the jury shall find that the defendant resided near R. in ——— county and the plaintiff in B. city, and that there was a daily mail from B. to R., which was the proper postoffice of the defendant and that the plaintiff deposited in the postoffice in B. on the ——— of ———, a letter containing the notice mentioned in the first instruction, then the said notice was sufficient notwithstanding the fact that it was not received by the defendant until the ——— of ———, 19—, and after the sale.[13]

(415) The court instructs the jury that if they find from the evidence that specific instructions were given by the defendant to the plaintiff on the ——— of ———, 19—, that in the event of the purchase of the stock in the evidence mentioned, the plaintiff should immediately communicate the fact of the purchase to the defendant and informed the plaintiff where to send the notice, and if they shall further find that the said stock was purchased on the said ——— of ——— by the plaintiff, and that plaintiff did not communicate the fact of the purchase immediately to the defendant, according to the order and instructions of the defendant, then the defendant was not required to take said stock.[14]

Sale by brokers for delinquency in margins.

(416) The court instructs the jury that if they find that the plaintiff sent to the defendants, as margin on his contract with them, ———, and that defendants objected to receive such ——— as margin, and that plaintiff thereupon promised to replace said ——— with money and failed to

[12] Approved in Worthington v. Tormey, 34 Md. 182.
[13] Approved in Worthington v. Tormey, 34 Md. 182.
[14] Approved in Worthington v. Tormey, 34 Md. 182.

do so before the ——— of ———, that after such failure the plaintiff is not entitled to require the defendants to treat such ——— as available margin provided the jury find the usage as to margins set forth in the defendants' instructions.[15]

(417) The court instructs the jury that if they believe from the evidence that the defendant as stock-broker was carrying stocks for the plaintiff as alleged in the declaration under an agreement by which in case of a fall in the price, the plaintiff was to advance more margins to cover any deficiency, and that the defendant gave notice to the plaintiff that a further margin would be required, and that within two hours after giving the notice the defendant sold the stock for a deficiency of margin, and if the jury believe from the evidence that no time was specified in the agreement between plaintiff and defendant for compliance with the request for further margins then it is for the jury to decide whether reasonable time for performance by the plaintiff was given.[16]

(418) The court instructs the jury that if they believe from the evidence that defendant was employed as stock-broker by the plaintiff as alleged in the declaration, and that defendant in the course of such employment purchased stock on account of the plaintiff, and that the defendant advanced the sum stated in the declaration above the margin furnished by the plaintiff, and that the stocks were declining in the market, and that there was a deficiency, and if the jury believe from the evidence that plaintiff failed to furnish the requisite margins to make up the deficiency when called on by defendant, then defendant was warranted in selling the stock on due notice.[17]

[15] Approved in Appleman v. Fisher, 34 Md. 540.
[16] Hanks v. Drake, 49 Barb. (N. Y.) 186.
[17] Stewart v. Drake, 46 N. Y. 449.

Buying in to cover short sales—Notice to principal.

(419) The court instructs the jury that if they believe from the evidence that the defendant was a stock-broker as alleged in the declaration and sold stock short for plaintiff and made a contract with plaintiff, which required the plaintiff to keep on deposit with the defendant 20 per cent. of the amount necessary to make good the short sale, according to the state of the stock market from time to time and to pay interest at the usual rates upon periodical balances stated, that then the defendant was bound to give to plaintiff reasonable notice of want of sufficient margin, and of an intention to buy in the stock and cover the short account if there was a short account, if the margins were not made good.[18]

Ratification of irregular sale by broker.

(420) The court instructs the jury that if they believe from the evidence that the plaintiff was a stock-broker, and that he sold stocks, which he was carrying as alleged in the declaration for the defendant upon a margin, without a proper notice of time and place of sale, and that subsequently the defendant after an account had been rendered showing the result of the sale paid the amount lost, the jury may find a waiver by the defendant of notice of the sale and a ratification of the sale.[19]

Dealings of broker adverse to interest of principal.

(421) The court instructs the jury that an agent is held to the most perfect faith in the dealings with his principal, and if he acts adversely to his employer in any part of the transaction or omits to disclose any interest which would naturally influence his conduct in dealing with the subject of the employment, it amounts to such a fraud upon the principal as to forfeit any right to compensation for services.[20]

[18] Rogers v. Wiley, 131 N. Y. 527, 43 N. Y. St. Rep. 918; Lazare v. Allen, 20 App. Div. (N. Y.) 616.

[19] Gillett v. Whiting, 141 N. Y. 71, 56 N. Y. St. Rep. 589.

[20] Murray v. Beard, 102 N. Y. 505.

(422) The court instructs the jury that a broker employed to sell lands cannot sell to himself, and if the jury believe from the evidence that the plaintiff was employed by the defendant to sell the lands described in the declaration as alleged in the declaration, and that the plaintiff so employed sold the lands to his own clerk, who was employed in the affairs of the defendant relating to the land and who had by his employment acquired special knowledge concerning the land, then the sale cannot be sustained although the price was adequate.[21]

(423) The court instructs the jury that the law does not permit brokers employed to purchase, to buy of themselves, and if the jury believe from the evidence that the plaintiff was employed by the defendant to purchase goods, and that the plaintiff in good faith and because plaintiff believed he could give the defendant a better bargain than by buying elsewhere sold to the defendant his own goods, the defendant may refuse to be bound by the transaction.[22]

III. Right of Broker to Commissions.

Establishment of contract of employment.

(424) The court instructs the jury that if they believe from the evidence that plaintiff (was employed by a smelting company as agent, to procure contracts for smelting ore as alleged in the declaration, and that plaintiff induced the smelting company to smelt and refine the ore of the defendant and to buy the refined product from the defendant, and that the plaintiff acted solely in the interest of the smelting company by advising the smelting company how to obtain the refined product at the lowest price, and if the jury believe from the evidence that there was no employment of the plain-

[21] Gardner v. Ogden, 22 N. Y. 327.

[22] Taussig v. Hart, 58 N. Y. 425; Levy v. Loeb, 85 N. Y. 365.

tiff by defendant, then the plaintiff cannot recover commissions from the defendant on account of the sale of the ore).[23]

Performance of duty by broker.

(425) The court instructs the jury that where a broker is employed to sell or exchange real estate and brings a buyer to the seller who is willing and ready to enter into an agreement with the seller for the purchase of his property, on the terms which the seller has fixed, and the seller is satisfied to accept the proposed buyer as a purchaser then the broker has earned his commission.[24]

(426) The court instructs the jury that the person procured as a purchaser must be able to complete the transaction, and that to entitle a broker to commissions for effecting an exchange of property, he must show through his efforts not only a valid contract was entered into by persons competent to make the same, upon terms and conditions agreeable to the principals, but also that the proposed purchaser was able as well as willing to carry out the contract made, and that the trade fell through by reason of the inability or capriciousness of his employer to consummate it.[25]

(427) The court instructs the jury that the mere fact that the broker obtains a more advantageous offer than the one finally accepted by his employer, does not entitle him to commissions, and that if the jury believe from the evidence that (the plaintiff was employed by the defendant as alleged in the declaration to sell the goods described in the declaration, and the defendant fixed a price at which the goods were to be sold, and that plaintiff obtained an offer of a price lower than that fixed by the defendant, and that meanwhile defendant accepted an offer lower still from another person, plaintiff is not entitled to commissions).[26]

[23] Harnickell v. Parrot Silver & Copper Co., 117 N. Y. 644, 27 N. Y. St. Rep. 697.

[24] Kalley v. Baker, 132 N. Y. 1, 42 N. Y. St. Rep. 762.

[25] Moskowitz v. Hornberger, 20 Misc. Rep. (N. Y.) 558.

[26] Jacobs v. Kolff, 2 Hilt. (N. Y.) 133.

(428) The court instructs the jury that if the principal rejects a purchaser and the broker claims his commission, he (the broker) must show that the person furnished by him (the broker) to make the purchase was willing to accept the offer precisely as made by the principal, that he was an eligible purchaser and such a one as the principal was bound in good faith, as between himself and the broker, to accept.[27]

Necessity of procuring bargain or offer.

(429) The court instructs the jury that, if the plaintiffs agreed and undertook to sell the defendant's farm for a commission upon the price realized, then in order to earn their said commission, it must appear by a preponderance of the evidence that they effected a sale of the farm to a party ready, willing and able to perform the conditions of the sale. The mere procuring of a person to enter into a contract to purchase the land, unless such purchaser was ready, willing and able to make the cash payments named in the contract, and to make the mortgage therein named for the deferred payments, would not be sufficient to entitle the plaintiffs to their commission.[28]

Procuring cause of sale.

(430) The court instructs the jury that if they shall find from the evidence that the plaintiffs were employed by the defendant as real estate brokers to sell for the defendant his house situated on the ——— in ——— city and if the jury shall find from the evidence, that there was a custom among the brokers in ——— city, by which, if a real estate broker is employed to sell property, he undertakes to introduce to the seller a prospective purchaser and if the prospective purchaser subsequently purchases the property at a price acceptable to the seller, and the purchase is induced by the introduction of the purchaser by the broker to the seller, then the broker becomes entitled to his commissions, and if the jury

[27] Approved in Buckingham v. Harris, 10 Colo. 455.

[28] Approved in Stewart v. Fowler, 37 Kan. 677.

shall find from the evidence that the defendant at the time of said employment, had been largely engaged in buying and selling real estate and had bought and sold through the agency of real estate brokers and that plaintiffs after their said employment, if the jury shall find that they were employed, brought together the said defendant and one C., and that C., afterwards within a reasonable time actually purchased the said property from the defendant and that the procuring cause of the purchase by C., was the introduction of C., to the defendant by plaintiff, then plaintiffs are entitled to recover such commissions as the said jury shall find usual and customary with interest in their discretion from the date of the commencement of said sale and it is immaterial whether or not the services of plaintiff so rendered were actually beneficial to said defendant and it is immaterial at what price the property was actually sold except in calculating the amount of commissions.[29]

(431) The court instructs the jury that if they believe, from the evidence, that Mr. D., as the representative, broker or agent of the defendant, opened negotiations with M. for the sale to him of the property in question, with the knowledge and permission of the defendant, and that the plaintiffs, being advised of Mr. D.'s employment and action, afterwards, having authority from the defendant to find a purchaser for the same property, endeavored to make a sale thereof to said M., but were not instrumental in so doing, then the plaintiffs are not entitled to compensation for their services in endeavoring to make said sale, even though the jury may further believe from the evidence that the defendant, through the instrumentality of Mr. D., acting independently of said plaintiffs, afterwards succeeded in selling said property to said M. One claiming a commission for the sale of real estate cannot rightfully claim the benefit of introducing to the defendant a purchaser for his property who had already been introduced

[29] Blake v. Stump, 73 Md. 160.

to him as such by another party, with and through whom negotiations were already in progress and were continued to a consummation of the sale.[30]

Actual negotiation by broker of final agreement or participation therein.

(432) The court instructs the jury that a broker need not negotiate or participate in negotiating a final transaction between the parties, and that if the jury believe from the evidence that (plaintiff was employed as broker as alleged in the declaration for the sale of the real estate of the defendant as described in the declaration and that plaintiff first brought notice of the fact that defendant's property was for sale to A., and if the jury believe from the evidence that A. after being informed of the terms of the sale, dealt with the defendant and purchased the property, then the fact that plaintiff was not present at the time the contract of sale was executed will not deprive plaintiff of his commissions).[31]

Sales by employee of broker without disclosure of relation.

(433) The court instructs the jury that if you find from the evidence given to you in this cause that the defendant employed plaintiff as a real estate broker to sell his farm, and that the plaintiff, for the purpose of aiding and assisting him in selling said farm, and for the purpose of procuring a purchaser therefor, took into his employ and service one W. and if you further find that said W., aiding and assisting said plaintiff in the sale of said farm, took to this defendant one L. as a probable purchaser for said farm, and if you further find that in the presence of said W. the said L. inquired of this defendant the selling price of said farm and then and there informed the defendant that he desired to purchase direct from the owner, and that he had never seen or been

[30] Fessenden v. Doane, 188 Ill. 228.

[31] Lloyd v. Matthews, 51 N. Y. 124; Bickart v. Hoffmann, 46 N. Y. St. Rep. 886.

introduced to the plaintiff, and that he would not purchase of commission men, and you further find that the defendant did not know that the sale was being made by the plaintiff, and if said W. stood by and did not inform this defendant that the sale was being made by the plaintiff, the plaintiff would now be estopped from claiming that the said W. was acting for and on his behalf in the sale of said farm, and you should find for the defendant.[32]

Departure from original instructions of principal.

(434) The court instructs the jury that it is not essential to entitle a broker to his commissions that he should have procured a purchaser upon the precise terms named by his principal at the time of employment. If he procures a purchaser and negotiations are continued without a withdrawal of either party and culminate in a sale though for a sum less than that originally demanded and upon different terms, the principal thereby ratifies the departure from his instructions and is liable for the commissions.[33]

Consummation of bargain.

(435) The court instructs the jury that in ordinary cases, the law is well settled where a broker is employed in reference to a sale of real estate, that when he brings a buyer to the seller who is willing and ready to enter into an agreement with the seller for the purchase of his property on the terms that the seller has fixed, and the seller is satisfied to accept him as a purchaser, then the broker has earned his commission. The earning of it is not dependent, in such cases, on the question as to whether the buyer carries out the contract, or as to whether the seller is able to complete his contract. Therefore, in the absence of any express agreement to the contrary, the law is that the broker is entitled to his commissions when the vendor accepts, when he (the broker)

[32] Approved in Mullen v. Bower, 22 Ind. App. 294.

[33] Levy v. Coogan, 16 Daly (N. Y.) 137, 30 N. Y. St. Rep. 553.

brings to the vendor a party ready and willing to accept the terms fixed by the vendor, and the party is satisfactory to the vendor, and he enters into a contract with him. The contention is that there was a different agreement here. That question is for you to determine. If you find that this was an ordinary contract, made without any conditions, the broker employed in the usual way, and that there was no bargain entered into between the plaintiff and the defendant, Mr. B., that he was only to be paid his commission in case this sale went through, then plaintiff is entitled to recover. If, however, the bargain agreed upon between plaintiff and defendant was that commission was only to be paid in case this whole transaction went through, as provided by the terms of the contract of sale, the plaintiff is not entitled to recover unless you are satisfied from the evidence here that the defendant capriciously refused to carry out the contract.[34]

Same—Failure of principal to consummate bargain.

(436) The court instructs the jury that the principal cannot escape liability to a broker who has negotiated a sale by afterwards insisting upon a condition to which the purchaser refuses to accede and if you believe from the evidence (that plaintiff was employed by the defendant to sell the property described in the declaration and that plaintiff obtained a purchaser and that defendant and the proposed purchaser made an oral contract, the minds of the parties agreeing, then you are instructed that the plaintiff is entitled to commissions though you may further believe from the evidence that the defendant afterwards insisted on incorporating into the formal written contract a condition not in the oral agreement and that the transaction fell through because of this insistence).[35]

(437) The court instructs the jury that where a principal contracts with an agent or broker to sell lands for or on behalf

[34] Approved in Kalley v. Baker, 132 N. Y. 1.

[35] Halprin v. Schachne, 27 Misc. Rep. (N. Y.) 195.

of the principal, and the broker performs his part of the agreement by finding and introducing a purchaser therefor, which purchaser negotiates with the principal, and comes to an agreement with him respecting the price and terms of sale, and which purchaser is ready, able and willing to carry out such agreement with the principal, then in such case the principal cannot evade payment of commissions to the agent by refusing to make conveyance to such purchaser. And this would be true even though the principal's title were defective, and even though he had no title at all. It would also be true even though the agent had agreed to take his commissions out of the purchase money and even though he agreed to charge no commissions unless a sale were actually made, for it is the law that a principal in such a case has no right to, himself, arbitrarily or wrongfully refuse to consummate such sale, and then say for that reason he will not pay commissions to the agent.[36]

(438) The court instructs the jury that if they believe from the evidence that (the plaintiff was employed by the defendant to sell the land described in the declaration, and that plaintiff brought the defendant and ——— together, and that defendant and ——— came to an agreement as to the sale of the land, and that thereafter the oral agreement was reduced to writing with a clause that the agreement was to be subject to the approval of the defendant's attorneys, and that no mention of the approval of attorneys had been made prior to the execution of the written contract, and if the jury believe from the evidence that———made a partial payment and stood ready to consummate the purchase and to execute any formal contract embodying the terms agreed on in the oral agreement, but that the defendant sought to impose new conditions and by his acts defeated the completion of the transaction, then the jury are instructed that the plaintiff is entitled to his commissions).[37]

[36] Approved in Swigart v. Hawley, 140 Ill. 186.

[37] Halprin v. Schachne, 27 Misc. Rep. (N. Y.) 195.

(439) The court instructs the jury that when an agent or broker in good faith has produced a purchaser who is acceptable to the owner, and able and willing to purchase on terms satisfactory to the owner, or as offered by the owner, he has performed his duty; and if, from any failure of the owner to enter into a binding contract, the sale is not completed, the agent may recover his commission.[38]

(440) The court instructs the jury that the principal cannot escape liability by refusing to complete a transaction and if you believe from the evidence that plaintiff procured a purchaser in pursuance of his contract of employment by the defendant and that the defendant made an agreement with the purchaser for a sale, which was subsequently abandoned because defendant insisted upon the full cash payment instead of a mortgage for part as was agreed by the contract of sale, then you are instructed that plaintiff was entitled to commissions.[39]

(441) The court instructs the jury that a broker who has found a party ready and willing to carry out an exchange of real property upon the terms fixed by his principal, cannot be defeated in his claim for commissions because his principal has been able to make a more advantageous bargain.[40]

Bargain effected by principal or others.

(442) The court instructs the jury that to entitle a real estate broker to commissions, he must be the procuring cause of the sale. The broker may devote his time and labor and expend his money, he may have introduced parties to each other who otherwise would never have met, he may have created impressions which under later and more favorable circumstances, materially assist in the consummation of the sale, and yet not be entitled to commissions, if his principal has acted

[38] Buckingham v. Harris, 10 Colo. 455.
[39] Levy v. Ruff, 4 Misc. Rep. (N. Y.) 180, 53 N. Y. St. Rep. 174.
[40] Moses v. Helmke, 18 Misc. Rep. (N. Y.) 357.

in good faith and (if you believe from the evidence that the plaintiff was employed by the defendant to sell the property described in the declaration as alleged in the declaration and that the plaintiff listed the property on his books and told a friend or acquaintance who the owner was and if you further believe from the evidence that the friend in turn imparted the information received from the plaintiff to an intending purchaser, who thereupon went directly to the defendant and purchased the property without ever having seen or communicated with the plaintiff, then you are instructed that this alone is not sufficient to entitle the plaintiff to a commission).[41]

(443) The court instructs the jury that a bargain procured by the broker must be conformable to the terms of the employment, and that if the jury believe from the evidence that the plaintiff (was employed by the defendant as broker as alleged in the declaration to effect a lease, and that A. with whom plaintiff negotiated for the lease of defendant's property failed to agree to the defendant's terms, but submitted a counter offer which the defendant rejected, and if the jury believe from the evidence that the defendant upon the rejection of the counter offer announced to plaintiff in good faith that the negotiation was closed and that afterward a lease was effected to A. on different terms from those contained in the original agreement of the plaintiff, then the jury should find in favor of defendant).[42]

(444) The court instructs the jury that if they believe from the evidence that the plaintiff was employed by the defendant to effect a sale of the property described in the declaration and that the plaintiff was allowed a reasonable time within which to procure a buyer and that the plaintiff failed to effect the sale within the reasonable time allowed him and that the defendant in good faith terminated the agency and employed other agents by means of which the

[41] Colwell v. Tompkins, 6 App. Div. (N. Y.) 93, 158 N. Y. 690.

[42] Alden v. Earle, 31 N. Y. St. Rep. 375, 121 N. Y. 688. See, also, Sibbald v. Bethlehem Iron Co., 83 N. Y. 378.

sale was consummated, then you are instructed that the plaintiff is not entitled to commissions, although you may further believe from the evidence that the sale was in some degree aided by the previous unsuccessful efforts of the plaintiff and that the purchaser was the one whom the plaintiff had introduced.[43]

(445) The court instructs the jury that to entitle a real estate broker to commissions on the sale of property, it is essential that he shall be the procuring cause of the identical contract of sale, for which commissions are claimed, and if you believe from the evidence (that plaintiff was employed by the defendant to sell the property described in the declaration and that no power was given to the plaintiff to finally transfer the property and that an offer to purchase was procured by the plaintiff, and submitted to the defendant who rejected the offer, then you are instructed that plaintiff is not entitled to commissions though the sale was afterwards consummated between the defendant and the person who made the offer on different terms).[44]

(446) The court instructs the jury that one who has employed a broker to sell property, may himself sell it to a purchaser procured without aid from the broker and that to entitle the broker to commissions the sale must result from his efforts and if you believe from the evidence that the plaintiff (was employed by the defendant to sell the property described in the declaration and that the plaintiff opened negotiations with a customer, but failed to enter into an agreement with him and abandoned the negotiations and that the defendant subsequently sold to such customer, then you are instructed that plaintiff was not entitled to commissions).[45]

[43] Sibbald v. Bethlehem Iron Co., 83 N. Y. 378.

[44] White v. Twitchings, 26 Hun (N. Y.) 503.

[45] Satterthwaite v. Vreeland, 3 Hun (N. Y.) 152, 5 T. & C. (N. Y.) 363.

(447) The court instructs the jury that if you believe from the evidence that plaintiff was employed by the defendant to sell the lands described in the declaration, and that a purchaser was obtained through the plaintiff's services, then you may find a verdict for the plaintiff, though you may also believe from the evidence that the purchaser was unknown to the plaintiff and that the transaction of the sale was completed directly between defendant and the purchaser.[46]

(448) The court instructs the jury that if a broker has made efforts to sell property of his principal in pursuance of his employment and his services have resulted in procuring a purchaser, he may be entitled to commissions, though the purchaser is unknown to the broker and dealt directly with the principal, and if the jury believe from the evidence (that the plaintiff was employed to make a sale of the real property described in the declaration as alleged therein and that the plaintiff advertised the property for sale, by which means a purchaser's attention was called to the land and that the purchaser submitted an offer to a subagent who communicated the offer to the defendant and thereafter negotiations were continued without interruption between the purchaser and the defendant personally until a sale was consummated, then you are instructed that the efforts of the plaintiff were the procuring cause of the sale and plaintiff is entitled to commissions).[47]

Withdrawal of negotiations from control or management of broker.

(449) The court instructs the jury that the fact that after the broker employed by the purchaser has presented a vendor, the purchaser takes charge of the negotiations and concludes them upon the terms proposed by the broker, does not defeat the broker's claim for compensation.[48]

[46] Sussdorf v. Schmidt, 55 N. Y. 319.
[47] Doran v. Bussard, 18 App. Div. (N. Y.) 36.
[48] Baer v. Koch, 2 Misc. Rep. (N. Y.) 334, 51 N. Y. St. Rep. 427.

Sale to person, introduced by broker, by fictitious or intermediate transfer.

(450) The court instructs the jury that a broker may recover commissions where title is taken by a stranger to the negotiations for the purpose of defeating his commissions, but that while this is so, bad faith must be shown and if you find from the evidence that (the plaintiff was approached by A., who wished to buy a house and requested him to make exertions in that direction and that the plaintiff introduced A. to the defendant and informed the defendant that if A. purchased, the defendant must pay commissions, and if you find from the evidence that the negotiations failed to result in an agreement and that afterwards defendant conveyed his house to his brother and that subsequently A. bought of the brother, then you are instructed that plaintiff was not entitled to commissions, unless you further find that the transfer to the brother was in bad faith).[49]

(451) The court instructs the jury that if they believe from the evidence that plaintiff was employed by the defendant to sell the land described in the declaration as alleged in the declaration and that plaintiff's services resulted in a sale of the land to A., then you will find that plaintiff is entitled to commissions although you may further believe from the evidence that another broker on information derived from A., negotiated a contract of sale for the same land from the defendant to the representative of A., and that A. acquired the land by an assignment of the contract from his representative, and although you may further believe from the evidence that such other broker received his commissions upon the sale from the defendant, who paid him in ignorance of the facts, but without making any inquiry.[50]

[49] Bennett v. Kidder, 5 Daly (N. Y.) 512.
[50] Winans v. Jaques, 10 Daly (N. Y.) 487.

Fraud or bad faith of broker.

(452) The court instructs the jury that if you believe from the evidence that plaintiff was employed by the defendant to sell the property described in the declaration, and that the plaintiff procured a purchaser on the terms proposed by the defendant and that the plaintiff attempted to induce defendant to take less than the price which was offered by the prospective purchaser, then plaintiff is not entitled to compensation.[51]

Double commissions or employment.

(453) The court instructs the jury that a real estate broker who is merely employed to find a purchaser of property upon terms and conditions to be determined by the seller when he meets the purchaser, and who is a mere middleman not vested with discretion respecting the price and terms of sale may accept a similar employment from a proposed purchaser and may be entitled to commissions from each party on the bargain being struck, although he has not informed either of his employment by the other.[52]

Right as to commissions in absence of express contract as to amount.

(454) The court instructs the jury that if they find from the evidence that plaintiff was engaged in the business of a property broker in the city of B. and that the defendant offered certain property for sale to the park commissioners of said city and that he employed the plaintiff to aid and assist him in effecting said sale, either by previous authority or the acceptance of the plaintiff's agency and the adoption of his acts, and that the plaintiff did diligently and faithfully occupy his time and render services in so aiding him to effect said sale and a sale of said property to said commis-

[51] Martin v. Bliss, 57 Hun (N. Y.) 157, 32 N. Y. St. Rep. 930.

[52] Knauss v. Gottfried Krueger Brewing Co., 31 Abb. N. C. (N. Y.) 454, 142 N. Y. 70, 58 N. Y. St. Rep. 316; Haviland v. Price, 6 Misc. Rep. (N. Y.) 372, 56 N. Y. St. Rep. 402.

sioners was in a short time made and effected and that said services were of advantage and value to the defendant in effecting the said sale, then the plaintiff is entitled to recover such sum as the jury may find from the evidence to be a reasonable remuneration to the plaintiff for said services, and in ascertaining what is a reasonable remuneration, the jury may consider the rate of compensation, which they may find from the evidence was usual and customary in the said city for services of a like kind.[53]

(455) The court instructs the jury that if they find from the evidence that the defendant employed the plaintiff to procure a purchaser for the property spoken of by the witnesses and the plaintiff did procure a purchaser for said property and the said property was sold by the defendant to the purchaser procured by the plaintiff, then the plaintiff is entitled to recover such compensation as they may find usual and customary.[54]

CHAPTER XXVII.

BUILDING AND CONSTRUCTION CONTRACTS.

Authority of architect to employ persons to do work, 456.
Substantial performance of contract, 457-461.
Departure from original contract—Recovery for extra work and materials, 462-464.
Time of performance—Waiver of delay, 465.
When evidence of custom admissible, 466.
Architect's certificate as condition precedent to recovery, 467-469.
Certificate of engineer as to work done and amount due under railroad construction contract, 470, 471.
Liability of architect in the performance of his duties relating to the construction of buildings, 472.
Rights of architect, 473.

Authority of architect to employ persons to do work.

(456) The court instructs the jury that if they believe

[53] Approved in Walker v. Rogers, 24 Md. 237.
[54] Approved in Jones v. Adler, 34 Md. 440.

from the evidence that defendants (employed A. as their architect, to draw for them plans and specifications for a building to be erected for defendants and to superintend the building during its erection, and that defendants entered into a contract with B. to erect such building and complete it for a stipulated price according to such plans and specifications, and if the jury believe from the evidence that the plans and specifications called for brick piers under said building and that the building so contracted for was in process of erection by B. under the contract with the defendants, given in evidence in this case, and that A. acted as architect under said contract, then, although the jury may further believe, from the evidence, that A. while so acting, employed the plaintiffs to remove the brick piers and put stone ones in their places, and that there was necessity for so doing, yet the court instructs the jury as a matter of law, that A. by virtue of his employment as architect, had no authority to bind defendants by employing plaintiffs to do said work and in the absence of proof that defendants authorized A. beforehand to do so, or had knowledge of all the facts, and subsequently ratified such act of employment, the jury should find for defendants, and the court instructs the jury that if they believe from the evidence that at the time of doing the work in question here sued for B. was constructing the building either by himself or his subcontractors, and that B. was doing said work under the said special contract given in evidence, then, although the defendants, or one of them, was present at times when plaintiffs were doing the work in question, and said work was for their benefit or the benefit of the premises, still, the law will not imply an undertaking on the part of defendants to pay for said work).[1]

Substantial performance of contract.

(457) The court instructs the jury that substantial per-

[1] Campbell v. Day, 90 Ill. 363.

formance, as applied to a building contract, permits only such omissions or deviations from the contract as are inadvertent or unintentional, are not due to bad faith, do not impair the structure as a whole, are remediable without doing material damages to other parts of the building in reconstructing and may without injustice be compensated for by deductions from the contract price.[2]

(458) The court instructs the jury that if they believe from the evidence that the plaintiff in this case entered into a contract with defendant for the construction of ——— and that the plaintiff completed the ——— in a workmanlike and substantial manner and to the satisfaction of the engineer of the ——— company and that the ——— was accepted by the defendant company, then the plaintiff is entitled to recover any sum that may be due him for said work under the contract here sued on, although the jury may believe from the evidence that the defendant company directed a change in the method of doing the work.[3]

(459) The court instructs the jury that under the written contract in evidence, the defendant was entitled to have erected such a building as was called for by the terms of the contract, and, though the jury may believe that there has been a substantial performance of the terms of the contract by the plaintiffs, yet nevertheless if the jury believe that the terms have not been fully complied with, the jury should allow to the defendant such sum or sums as from the evidence they may believe are reasonable and proper to enable the defendant to complete the building in the manner stipulated for in the contract.[4]

(460) The court instructs the jury that there may be a

[2] Spence v. Ham, 27 App. Div. (N. Y.) 379; Glacius v. Black, 50 N. Y. 145.

[3] Norfolk & W. R. Co. v. Mills, 91 Va. 613.

[4] Approved in Keeler v. Herr, 157 Ill. 57.

recovery without a literal or exact performance, as where a builder has in good faith intended to comply with the contract and has substantially done so, although there may be slight defects caused by inadvertence or unintentional omissions and (if the jury believe from the evidence that the plaintiff entered into a contract with the defendant to construct for defendant the building described in the declaration, and that there was a deviation from the plans constituting a part of the contract, by which the attic was made five inches lower than that called for by the plans and if the jury believe from the evidence that this error was caused by a mistake in measurement not detected by either party or by the architect until the building was completed, and that the deviation did not affect the exterior appearance of the building or its usefulness or value in any respect, then the jury may find that there has been a substantial performance and in such case they will render a verdict for the plaintiff for the contract price less the damages, if any, which they may find to have resulted from the defect).[5]

(461) The court instructs the jury that in deciding whether or not plaintiff was proceeding with said building in compliance with the contract, you are instructed that there must have been a substantial compliance in every material particular in each item as called for by a fair, reasonable and practical construction of the contract, and plans and specifications, taken together and where there is a conflict, if any, in these, this should be reconciled in a practical, workmanlike manner, so as to arrive at the fair and reasonable intention of the same.[6]

Departure from original contract—Recovery for extra work and materials.

(462) The court instructs the jury that if they find from

[5] Oberlies v. Bullinger, 132 N. Y. 598.

[6] Approved in Linch v. Paris Lumber & Grain El. Co., 80 Tex. 23.

the evidence that the defendant submitted or caused to be submitted to the plaintiffs the plan of the ——— to be built at the ———, as contained in the document which was given in evidence, indorsed "———," and the specifications of the ——— to be built at ——— as contained in said document, and that the plaintiffs undertook and agreed with the defendant to build said ——— in accordance with the said plans and specifications and upon the terms set forth in the articles of agreement, dated ———, also in evidence; and shall further find that after the commencement of the work in question, it was found impracticable to build said ——— in accordance with said plans and specifications and that the defendant changed the character of the ——— from a ——— to a ——— and required the plaintiffs to use ——— in the construction of the ——— not called for by the specifications, as contained in said plan, or by said articles of agreement, and of a greater length than the ——— called for by said papers, and that the plaintiffs built said ——— for the defendant in accordance with said changes and that the defendant accepted said ——— when finished and has not paid for the same; and shall further find that in consequence of said changes, the quantity and character of materials, and the amount of labor required to be furnished and done by the plaintiffs in the construction of said ——— was greatly increased and the plaintiffs suffered loss from delays in consequence of said changes, so that the plaintiffs were put to a greater expense in constructing said ——— as finally constructed, than they would have been, if said ——— had been built according to the said original plans and specifications, then the plaintiffs are entitled to recover such sum as the jury may estimate such increase of labor and materials and such loss to amount to; in making such estimate the jury will be guided by the price named in said

original contract, so far as the same may be applicable to the work and materials as done and furnished.[7]

(463) The court instructs the jury that if they find from the evidence the facts set forth in plaintiff's first prayer and shall further find that any portions of said ——— were built by the plaintiffs for the defendant, according to the said original plans and specifications, and said articles of agreement, and that said defendant has not paid for the same, then the plaintiffs are entitled to recover for such portions at the rates of compensation named in said agreement.[8]

(464) The court instructs the jury that under the terms of the contract sued on in this case, the ——— could be changed in any manner at any time, if the engineer of the defendant company considered such change necessary or expedient and that in case of any such change, no claim of an increase of price for the ——— on the part of plaintiff on that account would be valid or be required to be considered by the defendant, unless such claim should be made in writing before the work, under the plans as altered, should be commenced.[9]

Time of performance—Waiver of delay.

(465) The court instructs the jury that the parties to an agreement for the construction of a building may by their conduct waive the provisions contained in it and may extend the time of its performance and (if they believe from the evidence that plaintiff entered into a contract for the construction of the building described in the declaration, the building to be constructed in a certain time and that extra work was done by the plaintiff not called for by the contract, at the request of the defendant, and if the jury believe from

[7] Approved in Annapolis & B. Short Line R. Co. v. Ross, 68 Md. 310.

[8] Approved in Annapolis & B. Short Line R. Co. v. Ross, 68 Md. 310.

[9] Norfolk & W. R. Co. v. Mills, 91 Va. 613.

the evidence that the work called for by the contract would have been done in time if it had not been for the extra work, then the jury are instructed that the defendant cannot insist on the performance of the contract in the time specified in the contract as being absolutely essential).[10]

When evidence of custom admissible.

(466) The court instructs the jury that if they believe from the evidence that (the plaintiff was employed as an architect to make plans and diagrams of the building, described in the declaration, to be erected by the defendant, and if the jury believe from the evidence that there was a custom in the building trade, of long standing, and well known to the public that the employment of an architect to make plans and designs for a building, carries with it an employment to superintend the construction of the building, and if the jury further believe from the evidence that plaintiff was prevented by the defendant from superintending the construction of the building, then the jury are instructed that the plaintiff was excused for thereafter abandoning the contract and may recover for the services which he actually performed, notwithstanding such abandonment).[11]

Architect's certificate as condition precedent to recovery.

(467) The court instructs the jury that if they believe from the evidence that the plaintiff made a contract with the defendant for the erection of the building described in the declaration, and that the contract provided that the plaintiff should erect the building in accordance with the plans and specifications of the architect in a good and workman-like manner to the satisfaction and under the direction of the architect, to be testified by a certificate under the hands of the architect, and if the jury believe from the evi-

[10] Van Buskirk v. Stow, 42 Barb. (N. Y.) 9.

[11] Wilson v. Bauman, 80 Ill. 493.

dence that before any payments were to be made to plaintiff by defendant plaintiff should obtain a certificate from the architect, then the jury are instructed that the mere fact that plaintiff completed the contract according to its terms, will not entitle him to recover payment, but that he must produce the architect's certificate of compliance with the terms of the contract unless he can show fraud, collusion or bad faith, and that it is not sufficient to excuse the production of the certificate that the architect unreasonably withheld it.[12]

(468) The court instructs the jury that if they believe from the evidence that plaintiff entered into a contract with the defendant for the construction of the building described in the complaint, payment to be made by the defendant to the complainant upon production of a certificate of performance by the architect and if the jury believe from the evidence that plaintiff applied to the architect for the certificate of performance in accordance with the contract and that the architect refused to give it, not on the ground of nonperformance by the plaintiff, but because defendant had told the architect not to give the certificates and that if the jury believe from the evidence that plaintiff had fulfilled his agreement, then the jury are instructed that plaintiff can recover notwithstanding the refusal or failure of the architect to deliver the certificates, if they find that the architect did refuse or fail to give the certificates.[13]

(469) The court instructs the jury that if they believe from the evidence that plaintiff entered into a contract with defendant to construct a building for defendant as alleged in the declaration and that by the terms of the contract plaintiff was not to receive payment until the architect should have given a certificate of performance, and if the jury believe from the evidence that plaintiff substantially fulfilled his contract, though unintentionally he was guilty of slight

[12] Schenke v. Rowell, 7 Daly (N. Y.) 286.
[13] Anderson v. Meislahn, 12 Daly (N. Y.) 149.

defects in the performance and that he has acted in good faith and to the best of his ability in carrying out the contract, and if the jury believe that the architect refused to give the certificate of performance, then the jury are instructed that such refusal was unreasonable, and plaintiff may recover notwithstanding such refusal.[14]

Certificate of engineer as to work done and amount due under railroad construction contract.

(470) The court instructs the jury that under the terms of the contract sued on in this case, the monthly estimates, in order to be valid, must be accompanied by the certificates of the chief engineer of the ——— Company approving the same, and declaring that the work done and materials furnished, as therein stated, are according to the contract, and that the charges for the same are according to the contract and without such certificate no payment could be demanded by the plaintiffs, and in all questions connected with such estimates, and the amounts payable thereby and thereunder, the decision of the said engineer is final and conclusive on both parties. And the court further instructs the jury, that if they believe from the evidence that the price fixed for the ——— mentioned in the plaintiffs' declaration was fixed in the monthly estimates provided for in said contract, and that said estimates were afterwards approved by the said engineer, and his certificates appended thereto, as provided in said contract, then the price so fixed for all the work included in said estimates must be considered by the jury as the correct prices, unless the jury further believe from the evidence that, in approving said estimates and in making his decision in reference thereto, and in giving the certificate approving the same, the said engineer was guilty of intentional fraud, or of such gross mistake as to necessarily imply bad faith on his part.[15]

[14] Demarest v. Haide, 52 N. Y. Super. Ct. (20 J. & S.) 398; Nolan v. Whitney, 88 N. Y. 648.

[15] Norfolk & W. R. Co. v. Mills, 91 Va. 613.

(471) The court instructs the jury that if the jury believe that the estimates provided for in the contract were proper, and show the correct amounts due the plaintiffs, then, before the plaintiffs could institute suit to recover the reserved percentage, they were bound to tender to the defendant the release stipulated for in the contract. But if the jury believe that the estimates were not proper because fraudulent, then the tender of such release was not necessary in order to give the plaintiffs the right to sue.[16]

Liability of architect in the performance of his duties relating to construction of buildings.

(472) The court instructs the jury that if a person employs an architect to draw plans for him and superintend the proper erection of the buildings and such architect is made the superintendent in the contracts between the owner and the contractors, and he only undertakes to give such superintendence as an architect usually gives, it is the duty of such architect to exercise such care and skill in the superintending of work on such buildings, as is customarily required from architects, and if the jury believe from the evidence that the defendant did not exercise the skill and care which architects are customarily required to exercise, and damages resulted to plaintiff from the failure to exercise such care and skill, then the jury should find for the plaintiff.[17]

Rights of architect.

(473) The court instructs the jury that if they believe from the evidence that plaintiff was employed by defendant as architect to superintend the erection of the building described in the declaration and that plaintiff had control of the workmen employed in the construction of the building and that the workmen were to be paid in installments as the

[16] Norfolk & W. R. Co. v. Mills, 91 Va. 613.
[17] Vigeant v. Scully, 20 Ill. App. 437.

building progressed and on production of the architect's certificates, and that plaintiff suffered a substantial defect in the work to pass uncorrected, which ordinary vigilance could have prevented, then the jury are instructed that plaintiff cannot recover for his services.[18]

CHAPTER XXVIII.

BUILDING AND LOAN ASSOCIATIONS.

Action by stockholder on paid-up stock, 474-479.

Action by stockholder on paid-up stock.

(474) The court instructs the jury that the plaintiff alleges that he became in due process the owner of certain shares of stock in the defendant building and loan association on condition that he was to pay an admission fee of a certain amount, and then pay installments on his stock for seventy-eight months. He alleges that the defendant building and loan association agreed with him, that upon the payment by him of these seventy-eight installments together with the membership fee, it would then repay to him the full amount of $100 upon each and every of the said shares of stock. Under that arrangement he took twenty-five shares of the stock. He alleges that he performed all the conditions and terms of the contract on his part, and that the seventy-eight months have elapsed, the seventy-eight payments have been made, and that he is entitled to his $2,500—that is to say, $100 for each and every share of stock so held by him. He sets up in the complaint, that some years subsequent to the time of entering into this contract, he borrowed under a distinct and definite agreement with the defendant building and loan association a certain amount

[18] Peterson v. Rawson, 15 N. Y. Super. Ct. (2 Bosw.) 234.

of money, and that he pledged as security for the loan which he thus obtained from the defendant, the shares of stock he already held in the association, and that he was bound by the loan to do certain things—that is, to pay the interest and premiums, and that he did pay these charges; and now admits that the defendant is entitled to offset this loan which he procured from it against the amount due on his original contract, to wit: the sum of $2,500; and only claims that the defendant is bound to pay him the balance, after deducting the amount of his loan from the amount of the original contract. The amount of the loan being $937.50, and deducting that amount from $2,500, which he claims to be due on his original contract, leaves the sum of $1,562.50, which he claims is now due him from the defendant; and for this he brings his suit, together with the interest from the time he alleges it became due and payable and was refused payment.[1]

(475) The court instructs the jury that the defendant does not deny that there was a contract between the plaintiff and defendant; does not deny that he is a stockholder or member of the defendant association, but it sets forth a different contract from that which the plaintiff sets forth. It alleges that instead of the period of seventy-eight months and seventy-eight monthly payments being limited as completing the performance of the contract by the plaintiff, that the contract was that he became a member of the defendant building and loan association, subject to all of its by-laws and rules and regulations, its charter and everything else governing the association; and claims further that under that arrangement he was bound to pay not only a definite, limited number of seventy-eight payments, but was bound to pay any additional payment which would be necessary,

[1] Approved in Williamson v. Eastern Building & Loan Ass'n, Syracuse, N. Y., 62 S. C. 390.

taken together with the profits on his payments, to mature his stock to the par value of $100 for each share.[2]

(476) The court instructs the jury that the point at issue between the two parties is whether or not the contract was a definite, limited contract—limited to the payment of seventy-eight installments by the plaintiff, and the absolute obligation of the defendant arising thereon to pay him $100 a share; or whether it was, on the other hand, a contract by which the plaintiff was to keep on paying until by the books of the association or in some other way—whatever way they arrived at such conclusion—until his shares would arrive at the value of $100 each. The certificate of stock and the other matters that enter into the contract, as specifically set forth in the certificate, are to be taken in connection with whatever representations the defendant actually made at the time the contract was entered into; and if it did make any representations in addition to those matters which led to the making of a different contract from that expressed by its by-laws and its articles of incorporation, that special contract governs rather than the general contract which would result from its by-laws and articles of incorporation in connection with the certificate of stock. It is for you to determine in the first instance, whether or not this defendant did induce the plaintiff by literature, by written or printed representations, or by verbal representations in addition to those contained in its certificate of stock and by-laws and other matters mentioned in the certificate to enter into this contract; whether it induced him to believe that it was a contract for a limited number of payments, and that upon the completion of those payments it would be a fulfillment by the plaintiff of his side of the contract, and an absolute obligation on the part of the defendant to pay the amount of $100 a share. And if the evidence in the case

[2] Approved in Williamson v. Eastern Building & Loan Ass'n, Syracuse, N. Y., 62 S. C. 390.

satisfies you that the defendant did hold out such representations, then those representations are binding on the defendant and fix the terms of the contract.[3]

(477) The court instructs the jury that the defendant in addition to its claim that it was an estimated period instead of a definite limited period sets up the further defense, that if it had undertaken to make a contract of the character that the plaintiff claims, that is a definite, fixed number of payments, that it would have been acting beyond its powers as a corporation under the laws that existed; and that, therefore, such an act on its part would have been void—that such a contract would have been void as being in excess of the powers it possessed to make. The supreme court in considering this case has laid down the principle that where the act that is alleged to be beyond the power of a corporation is not an immoral act, nor expressly forbidden by some law then the court will not allow the corporation to claim that it was ultra vires, or beyond its powers. So the principle of ultra vires cannot enter into this case.[4]

(478) The court instructs the jury that defendant's remaining defense is that the plaintiff waived the provisions of the contract when he entered into a subsequent contract by which he made a loan with the association. So that by the defendant's contention, if you should conclude that the plaintiff did have a definite contract with the defendant by which after the plaintiff had made seventy-eight payments he would be entitled to receive $2,500, still, if you should also conclude that he entered into the loan contract, the contention of the defendant is that he waived his rights under the original contract and became bound by whatever changes had been made in the by-laws of the association sub-

[3] Approved in Williamson v. Eastern Building & Loan Ass'n, Syracuse, N. Y., 62 S. C. 390.

[4] Approved in Williamson v. Eastern Building & Loan Ass'n, Syracuse, N. Y., 62 S. C. 390.

sequent to the making of the original contract and up to the time of the making of this loan contract. A person may waive the right which he has especially a right arising out of contract. And so, the plaintiff, even though he had the defendant bound by this original contract which he alleges, had the power and right if he chose to waive the benefits accruing to him or the rights growing in his favor out of the original contract, and so release the defendant from the performance of it. A defendant relying on such a defense is bound to establish the facts necessary to show the truth of the defense by a preponderance of the evidence that the plaintiff did cast aside his rights and benefits which had accrued to him already under the contract and thereby release the defendant from its performance. If the defendant has offered evidence, satisfactory to your mind, of a waiver, it constitutes a good defense to the plaintiff's recovery in this case. The plaintiff is not bound to show anything with reference to that matter unless in reply to anything which the defendant may show as going to establish the waiver. I charge you that where a man has a valid claim against another, he may afterwards pledge that claim to the other party in any transaction—any subsequent transaction—and yet by that act of pledging not waive any right which he may have had under the original transaction. The mere act of pledging the shares of stock does not amount to a waiver of any right which the plaintiff had under the original contract.[5]

(479) The court instructs the jury that if you believe from the evidence that the plaintiff has established his contract, and it does not appear to be an unreasonable or immoral contract, in which case the court would not allow him to set it up, he is entitled to recover on it, unless the defendant has shown something that would defeat it; and it

[5] Approved in Williamson v. Eastern Building & Loan Ass'n, Syracuse, N. Y., 62 S. C. 390.

only remains for you to determine whether or not he has established his contract. He is bound to prove it by the preponderance of the evidence; and if he has so established it, then it remains for you to determine what your verdict will be in his favor, unless the defendant may have shown some matter which goes to defeat his right. The plaintiff is suing on a specific, definite claim, which must be the amount which he claims or nothing at all. He claims that his stock is paid-up stock, that he is not suing to recover from the defendant an amount due on stock which was not paid up. He claims that his stock was fully matured or paid up, and that he is entitled on the terms of the contract to have the full amount due on his contract—less the offset of the loan which you have heard mentioned. So your verdict must be in favor of the plaintiff for the full amount he claims, or else in favor of the defendant. There is no ground for you to give a compromise verdict, to give him a few hundred or a greater number of dollars, but you must either give the plaintiff the full amount he claims or give a verdict in favor of the defendant.[6]

CHAPTER XXIX.

BUILDINGS.

Liability for personal injuries sustained because of defects in public building, 480.
Personal injuries sustained because of latent defects, 481.

Liability for personal injuries sustained because of defects in public building.

(480) The court instructs the jury that if they believe, from the evidence, that the defendants were the proprietors of the said ——— grounds, and selected or adopted a plan for

[6] Approved in Williamson v. Eastern Building & Loan Ass'n, Syracuse, N. Y., 62 S. C. 390.

the building of said ————, including the quantity, size, quality and strength of the materials to be used, and that the ——— was constructed upon such plan, and shall further believe, from the evidence, that the said structure was, in fact, weak, insufficient and dangerous to the lives or limbs of those who might go upon it, and that, before it was used by the visitors and patrons of said ———, the defendants, or any of them, were informed that it was weak, insufficient or dangerous, and did nothing to render it more secure, and, further, that said ———, or any part of it, did give away, break and fall, in consequence of such weakness and insufficiency, and plaintiff, as a visitor, and patron of said ———, without fault on his part, was injured in consequence thereof, such defendants should be held responsible to the plaintiff in damages.[1]

Personal injuries sustained because of latent defects.

(481) The court instructs that those latent defects which are either concealed in defective workmanship, or are incident to the ordinary wear and tear of houses, are among the casualties which no man can avoid without the extraordinary care and vigilance which the law does not impose. If you believe from the evidence that the platform was constructed in a good and substantial manner, and gave no indication of being unsafe, up to the accident, then the defendant was under no legal obligations to have the said platform inspected from time to time; and if you find from the evidence that the defect in said platform was secret, and unknown to defendant and was incident to the ordinary wear and tear of said platform, then you will find a verdict for defendant.[2]

[1] Approved in Latham v. Roach, 72 Ill. 179.

[2] Baddeley v. Shea, 114 Cal. 1.

CHAPTER XXX.

BURGLARY.[1]

Elements of the offense, 482.
Necessity of breaking, 483.
What constitutes breaking, 484.
Same—Opening of closed screen door a breaking, 485.
Same—Unlocking or opening of door a breaking, 486.
Same—Entry by one having a right to enter, 487.
Same—Entry at a time not authorized a burglarious breaking, 488.
Necessity of entering, 489.
What constitutes an entry, 490.
Necessity of felonious intent, 491.
Intention must be independently proven, 492.
Felonious intent must accompany both the breaking and the entry, 493.
Intent may be inferred from circumstances and conduct, 494.
Direct proof of intent not necessary, 495.
Intent need not be executed, 496.
Carelessness of owner in securing premises no defense, 497.

Elements of the offense.

(482) The court instructs that before defendant can be convicted of burglary, the state must prove (1st) the breaking (2nd) the entering (3rd) that the house broken and entered into was a dwelling house (4th) that the breaking and entering was in the nighttime (5th) that the breaking and entering was with the intent to commit a felony. In all these particulars, there must be proof satisfactory to the minds of the jury, and if the state fails upon any one point, the defendant is entitled to acquittal.[2]

Necessity of breaking.

(483) The court instructs that to constitute burglary,

[1] See Criminal Law for forms of instructions applicable to crimes generally, including possession of stolen property as evidence of guilt.

[2] State v. Whit, 4 Jones (N. C.) 349.

there must be an entry effected by means of a breaking of the dwelling house itself, and an unlawful entry through an open door or window, does not constitute burglary.[3]

What constitutes breaking.

(484) The court instructs that when it is said that a breaking of a dwelling house is necessary to constitute burglary, the word "breaking" is used in a technical rather than a literal sense and it is not necessary that any part of the dwelling house be actually fractured to constitute a breaking, but the removal or putting aside of some part of the house which is relied upon as security against intrusion, as by the opening of a closed door which is not locked or by the removal of a netting from an open window, is sufficient.[4]

Same—Opening of closed screen door a breaking.

(485) The court instructs that where the outer door of a building was open and a screen door was closed, but not fastened, the pushing open of such screen door, whereby entry into the house was effected, is a sufficient breaking to constitute the entry a burglarious one, if it was made with the intention required by law.[5]

Same—Unlocking or opening of door a breaking.

(486) The jury are instructed that the mere unlocking or opening of a door is a breaking, within the meaning of the statute.[6]

Same—Entry by one having a right to enter.

(487) The court instructs that if the defendant had a right to enter the building, as where he was one of the occupants thereof, or where the building was one open to the general use of the public, it is not a burglarious breaking for him to

[3] McGrath v. State, 25 Neb. 780.

[4] Dennis v. People, 27 Mich. 151; Com. v. Stevenson, 8 Pick. (Mass.) 354.

[5] State v. Conners, 95 Iowa, 485.

[6] State v. Tutt, 63 Mo. 595.

enter such building in a usual and ordinary manner, though the entry was made with an intention then entertained to commit a crime in such building, and not for any legitimate purpose.[7]

Same—Entry at a time not authorized a burglarious breaking.

(488) The court instructs that though defendant was employed during the day-time, at the building, with the entry of which he is charged, and had during the day in the course of his employment, the full right to enter there, if he had during the night-time no duties about the building, and was not called upon or authorized in the course of his employment to enter in the night-time, his entry during the night-time with the intent to commit a crime would be a burglarious entry, though it was effected by means of a key intrusted to him in the course of his employment.[8]

Necessity of entering.

(489) The court instructs that to constitute the crime of burglary, there must be not only a breaking, but an actual entry into the building.[9]

What constitutes an entry.

(490) The court instructs that to constitute an entry it is not necessary that the defendant should have brought his entire body within the building, but if any part of his body, even a finger, be brought within the interior of the building, it is sufficient to satisfy the requirements of the law.[10]

Necessity of felonious intent.

(491) The court instructs that though the jury believe from the evidence that defendant broke into and entered the dwelling house mentioned in the indictment in the night time, and that such breaking and entry were unlawful, he is not

[7] Clark v. Com., 25 Gratt. (Va.) 908; State v. Moore, 12 N. H. 42.
[8] Lowder v. State, 67 Ala. 39.
[9] State v. McCall, 4 Ala. 643.
[10] Com. v. Glover, 111 Mass. 395.

guilty of burglary, unless at the time of such breaking and entry, he entertained an intention to commit a felony in such dwelling house.[11]

Intention must be independently proven.

(492) The court instructs that the felonious intent to commit a crime within a building is a separate element of the offense and in order to convict of a burglary there must be proof of some fact or circumstance or some act or declaration of the defendant in addition to the proof of a mere breaking and entering from which the jury can find such an intention.[12]

Felonious intent must accompany both the breaking and the entry.

(493) The court instructs that in order to constitute burglary, both the breaking and the entering must have been made with the intention to commit a crime, and though the jury believe that defendant unlawfully broke and entered a dwelling house in the night-time, and that at the same time during such breaking and entering, he entertained a design to commit a felony within such dwelling house, or even if he actually did commit such felony, the offense is not burglary, if such design was not formed until after he had broken into and entered the house or if he committed the breaking without any such design, and thereafter with such design entered through the breach which he had previously made.[13]

Intent may be inferred from circumstances and conduct.

(494) The court instructs that though the intent to commit a felony within a dwelling house entered is an essential of the offense, existence of such intention may be and usually must be inferred from the circumstances and from the conduct of the person making the entry. The commission of an

11 Price v. People, 109 Ill. 109.
12 People v. Marks, 4 Park. Cr. Rep. (N. Y.) 153.
13 State v. Moore, 12 N. H. 42.

offense is strong but not conclusive evidence that the entry was for that purpose, and on the other hand an intention to commit an offense may be inferred from the circumstances of the entry and from the absence of other motives therefor, though no felony was in fact committed.[14]

Direct proof of intent not necessary.

(495) The intent with which an act is committed being but a mental state of the party accused, direct proof of it is not required, but it is generally derived from and established by the attendant facts and circumstances as shown by the evidence; so in this case the intent with which defendant entered the dwelling house of G. if you find that he did enter it, must be determined by you from all the evidence in the case.[15]

Intent need not be executed.

(496) The court instructs that to constitute the crime of burglary, it is necessary that the breaking and entering should be with the intent to commit a felony within the building, but it is not necessary that such intent should be carried out, and if the jury are convinced by the evidence that defendant did break and enter into the dwelling house mentioned in the indictment, and that he then and there entertained an intent to commit a felony therein, the jury should convict, though as a matter of fact, no crime of any kind was actually committed by defendant within such dwelling.[16]

Carelessness of owner in securing premises no defense.

(497) The court instructs that if the jury believe from the evidence that defendant entered the building mentioned in the indictment by breaking into the same, as breaking has been defined to you by the court, the fact that the owner or

[14] Com. v. Hope, 22 Pick. (Mass.) 1; State v. Boon, 13 Ired. (N. C.) 244; Steadman v. State, 81 Ga. 736.

[15] State v. Maxwell, 42 Iowa, 210.

[16] Harvick v. State, 49 Ark. 514.

his servants might by the use of reasonable care have so secured the building with its fastenings that no such breaking or entry would have been possible, and that defendant's entry was made possible only by the carelessness of the owner in failing to fasten his doors, is no defense.[17]

CHAPTER XXXI.

CARRIERS.

I. In General.

Duties of carriers by stage-coach, 498.
Injury to passenger attempting to alight from steamboat, 499-501.
Carriers of baggage—Connecting carriers—Burden of proof, 502.
Same—Liability for loss—Acts of public enemy, 503.

II. Carriers of Freight.

Failure to transport goods—Property subject to quarantine, 504.
Liability as warehousemen—Goods received for immediate shipment, 505.
Conclusiveness of bill of lading as to receipt of goods in good order, 506.
Delay exposing goods to unprecedented flood, 507, 508.
Destruction of freight by fire, 509, 510.
Validity of limitation of liability of connecting carrier, 511.
Damages, 512.
Liability for special damages, 513.
Duty of consignee to prevent further injury after delay, 514.
Recovery back of freight, 515.
Lien for freight on replevin by shipper to recover goods, 516.

III. Carriers of Live Stock.

Failure to furnish cars for transportation, 517.

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[17] Lyons v. People, 68 Ill. 271.

Liability for delay, 518.
Implied contract to deliver at a certain time, 519.
Liability for damage resulting from concealment of condition of cattle, 520.
Duty of connecting carriers to deliver, 521.
Liability of connecting carrier—Contributory negligence of plaintiff in loading stock, 522.
Limitation of liability of connecting carriers, 523.
Duty to make claim for damages within reasonable time, 524.

IV. CARRIERS OF PASSENGERS.

A. CARE REQUIRED IN GENERAL.

Degree of care required in general, 525-530.
Duty to exercise highest degree of care and caution, 531.
Liability of carrier as insurer, 532, 533.
Liability for mere accident where there is no neglect of duty, 534, 535.
Definition of negligence, 536, 537.
Duty required of carriers' employees, 538.
Duty as to control and discipline of servants, 539.
Duty to protect passenger from improper and unnecessary violence of servant, 540.
Liability for unauthorized acts of servants, 541.
Duty to anticipate passenger's negligence, 542.
Care in construction and inspection of cars, 543.
Liability for defective cars of other companies, 544.
Duty to foresee accident, 545-547.
Instruction eliminating contributory negligence, 548, 549.
Liability to person traveling free, 550-552.
Negligence in the operation of trains over tracks which passenger must cross in order to change cars, 553, 554.

B. THE RELATION OF CARRIER AND PASSENGER.

Person coming to station to board train, 555.
Effect of leaving train open for reception to passengers, 556.
Persons taking freight trains on which there is a custom to carry passengers, 557.
Right of mail clerk to recover for negligence, 558.
Express messenger—Injury from explosion of locomotive boiler, 559.
Person attempting to ride on ticket purchased from scalper, 560-562.

Where it is contended that plaintiff's intestate was a trespasser, 563.
Through contract of transportation—Liability for accident on connecting line, 564.
When relation terminates, 565.
Burden of proof, 566.

C. EJECTION OF PASSENGERS.
Ejection of passenger refusing to pay fare, 567.
Ejection of passenger on failure to exhibit ticket, 568.
Reasonableness of rule requiring surrender of ticket, 569.
Reasonableness of regulation requiring payment of extra charge where tickets are not procured, 570.
Effect of requiring extra charge as increasing extra fare beyond statutory limit, 571.
Duty to stop freight train at passenger station, 572.
Questions for jury as to proper place for stopping train, 573.
Expulsion of passengers on freight train who have not secured tickets, 574.
Right of carrier to make rules concerning stops and to eject passenger from train not stopping at his point of destination, 575.
Right of passenger having through ticket to stop over, 576.
Manner and place of expulsion, 577.
Liability for injury to passenger sustained in resisting expulsion, 578.
Right to expel disorderly passenger and secure arrest after expulsion, 579.
Question of fact as to existence of carrier's rules, 580.

D. TAKING ON PASSENGERS.
Discharge of carrier's duty by drawing up in usual manner, 581.
Making misleading stop before final stop at station, 582, 583.
Directions of employees inducing passenger to attempt to board train, 584.
Duty of passenger to obey warnings of carrier's servants, 585.
Duty to assist passenger to board train, 586.
Taking on passengers at out-of-the-way places, 587.
Effect of train being behind time, 588.
Duty to protect passenger from injury from trains on adjoining tracks, 589.
Starting while passenger is en route to seat, 590.
Invitation to passenger to cross the tracks at station, 591.

E. CARE AS TO STATIONS, TRACKS AND EQUIPMENT.

Necessity of furnishing platform, 592.
Requisite length of platform, 593.
Duty to protect persons on platform, 594.
Duty to light platform, 595, 596.
Effect of long-continued use of platform, 597.
Construction and inspection of bridges, 598.
Duty to inspect and replace ties, 599.
Accident resulting from sudden thaw, 600.
Broken rail caused by extreme cold, 601.
Duty to provide seats, 602.
Duty to provide seat in particular part of car, 603.

F. SETTING DOWN PASSENGERS.

Notice of arrival at station, 604.
Duty of passenger to be in readiness to alight, 605.
General liability, 606.
General duty—Instruction framed for defendant, 607.
Degree of care required to protect passenger while alighting, 608, 609.
Drawing up to the platform, 610.
Starting after temporary stop—Right of passenger to assume that first stop is at platform, 611, 612.
Duty to sufficiently light platform, 613.
Necessity of bringing train to complete stop, 614.
Duty to afford time to alight, 615, 616.
Definition of reasonable time to alight, 617.
Additional duty imposed by infirmity of passenger, 618.
Duty to assist feeble passenger, 619.
Duty of passenger to hasten to alight, 620.
Starting train while passengers are in act of alighting, 621, 622.
Use of unsafe box or device to assist in alighting, 623.
Effect of startling passenger, 624.
Liability for acts of brakeman in attempting to assist passengers to alight, 625.
Injuries received after alighting, 626, 627.
Instruction submitting issue of contributory negligence, 628.

G. CONTRIBUTORY NEGLIGENCE OF PASSENGER.

Definition of contributory negligence, 629, 630.
Doctrine of comparative negligence, 631-635.
Liability of carrier to use ordinary care to avoid consequences of plaintiff's negligence, 636.
Degree of care required of passenger, 637, 638.

Duty of passenger to exercise ordinary care, 639.
Definition of ordinary care, 640-642.
Risks assumed by passenger, 643.
Attributed negligence of plaintiff's husband, 644.
Instructions of carriers' servants justifying acts of passenger, 645.
Matters which may be considered in determining question of negligence, 646.
Use of intoxicating liquors, 647, 648.
Standing on platform, 649-651.
Riding on platform on account of lack of accommodations inside, 652.
Passing from one car to another, 653-656.
Statutory provision requiring that contributory negligence must be criminal, 657.
Criminal negligence where sufficient time to alight is not afforded, 658, 659.
Under statute requiring that act when not criminally negligent must be in violation of a known rule of the company, 660, 661.
Mail agent projecting head from car, 662.
Allowing arm to project from car window, 663, 664.
Postal clerk riding in mail car, 665.
Passenger leaping to avoid sudden danger, 666.
Alighting when train has not stopped at platform, 667, 668.
Failure to take note of arrival at station, 669.
Duty of passenger to exercise reasonable diligence while alighting, 670, 671.
Jumping from car steps to platform, 672.
Neglect of passenger to avail himself of railing, 673.
Passenger alighting from moving train, 674-676.
Matters controlling negligence in attempt to leave train in motion, 677.
Consideration of youth of plaintiff in determining question of negligence, 678.
Stepping from moving train where carrier has failed to make sufficient stop, 679-681.
Passenger alighting from moving train by direction of carrier's servant, 682-686.
Passenger pulled from moving train by conductor, 687.
Leaving moving train to avoid being carried by station, 688, 689.
Burden of proof of contributory negligence, 690, 691.
Burden of establishing freedom from contributory negligence, 692.

H. EVIDENCE AND BURDEN OF PROOF IN ACTIONS FOR INJURY TO PASSENGER.

Where burden lies in general, 693.
Burden of proof of negligence, 694.
Presumption of negligence from happening of injury, 695-698.
Shifting of burden, 699.
Burden of proof of invitation to alight, 700.
Effect of failure of evidence as to cause of injury, 701, 702.

Duties of carriers by stage-coach.

(498) The court instructs the jury that, it is the duty of stage proprietors who run a line of coaches for the conveyance of passengers, to provide good coaches, harness and horses, and good, skillful and careful drivers; and should they fail to do so, and their passengers are injured by such failure, the proprietors are responsible. They are not only to furnish good coaches, harness, horses, and skillful and careful drivers, but they are to keep them in good repair, and are to see that their drivers drive with the utmost skill and prudence. Carriers of passengers for hire are bound to exert the utmost skill and prudence in conveying their passengers and are responsible for the slightest negligence or want of skill either in themselves or their servants. They are bound to use such care and diligence as a most careful and vigilant man would observe, in the exercise of the utmost prudence and foresight.[1]

Injury to passenger attempting to alight from steamboat.

(499) The court instructs the jury that if they believe from the evidence that the boat of defendant had stopped at a point intermediate the point of the departure of the boat and the destination of plaintiff, and if they believe from the evidence that a staging had been run out so that passengers could pass to and from the boat, and that the boat was to stop at the said point several hours and if they further believe from the evidence that it was not dangerous

[1] Approved in Sales v. Western Stage Co., 4 Iowa, 547.

nor perilous so far as a prudent person could discover to attempt to leave the boat, then if the plaintiff while attempting to leave the boat over the staging, and while in the exercise of ordinary care was injured, through the lack of ordinary care on the part of defendant's servants, plaintiff may recover.[2]

(500) The court instructs the jury that in an action to recover damages for an injury sustained by plaintiff, against the defendant, for negligence, the injury complained of must have been occasioned by the negligence or carelessness of the defendant; and if the jury believe from the evidence, that the injury complained of was occasioned by the plaintiff, on leaving defendant's boat, in jumping ashore and striking some hard substance concealed under the snow on the wharf or landing, and thereby produced the injury, and that said hard or uneven substance occasioning the injury was not placed there by or known to the defendant, and that the landing was made at the usual place of landing passengers, then this is not such negligence, on the part of defendant, as will entitle the plaintiff to recover against them. That the negligence or carelessness contemplated by the law to render the defendant liable for the injury complained of, must be a want of care and vigilance on the part of the employees of the defendant, and they cannot be held liable for accidents occurring, by which an injury is sustained by a person, from causes not under their control or care.[3]

(501) The court instructs the jury, if the jury believe, from the evidence, that even if the jury should believe, from the evidence, that the captain of the boat told the plaintiff to jump off the boat at the time he jumped off, that he could do so with safety, yet left it voluntary with the plaintiff to jump or not, then what the captain might have said at the time (if the jury believe, from the evidence, anything

[2] Keokuk Northern Line Packet Co. v. True, 88 Ill. 608.
[3] Northern Line Packet Co. v. Binninger, 70 Ill. 571.

was said) did not release the plaintiff from the duty of exercising reasonable judgment and caution as to whether it was safe to get off or not; and if the jury believe, from the evidence, that, under all the circumstances existing at the time, a man of ordinary prudence, situated as plaintiff was, would not have jumped off, then the jury should find for defendant.[4]

Carriers of baggage—Connecting carriers—Burden of Proof.

(502) The court instructs the jury that if they find from the evidence that the trunk in question was in the possession and under the control of the defendant at P., then the burden of proof is on the defendant to show that the said trunk was carried in safety by the defendant to their terminus in M., and that it was there delivered by the defendant safely to the railroad company, which the jury may find was the company that ought to have carried the trunk to N., if the journey had not been interrupted, for the purpose of having it transported to N., and that unless the jury find that the said trunk was so delivered, the plaintiff is entitled to recover the value of the said trunk and its contents provided the jury find that the said trunk was never delivered to the plaintiff and that a demand for the said trunk was made by the plaintiff or her agent as proved by the plaintiff's witnesses.[5]

Same—Liability for loss—Acts of public enemy.

(503) The court instructs the jury that if they shall find from the evidence in the case, that the plaintiff procured, in the city of B. on the —— day of ——, 19—, a through ticket to the city of N. and that she started in the train of that morning and in one of the cars of the defendant with a certain trunk as a part of her baggage, for which she had

[4] Northern Line Packet Co. v. Binninger, 70 Ill. 571.

[5] Philadelphia, W. & B. R. Co. v. Harper, 29 Mo. 330; Harper v. Philadelphia, W. & B. R. Co., Id.

received a baggage check marked No. ——, and shall find from the evidence that such through ticket was of the form and character as the through ticket which has been offered in evidence in this case, and shall further find from the evidence in the cause that such through ticket was issued by the authority of the defendant, of the ——— R. R. Co., and of the ——— Railroad & Transportation Co., in virtue of an arrangement before that time made, and then subsisting between said companies, and shall further find, that said several companies were separate and independent companies; and shall further find from the evidence in the case that the prompt transportation of the plaintiff and her baggage from B. to N. was prevented by an incursion of the public enemy on said date by which the train was stopped at M. and the baggage removed from the cars and that the cars themselves were destroyed by fire and that much of the baggage was carried off and part thereof greatly injured, and shall further find that afterwards and without any neglect or unavoidable delay on the part of the defendant or its servants or agents, except such delay as the jury may find from the evidence in the case was occasioned by the incursion of the public enemy as above stated, the baggage of the plaintiff so far as not carried off by the public enemy or others was forwarded over the road of the defendant and was carried safely by the defendant to their terminus at P. and that it was there delivered by the defendant safely to the railroad company which the jury shall find was the company that ought to have carried the trunk to N., if the journey had not been interrupted, for the purpose of having it transported to N., and that the defendant had not before or at the time of the commencement of this suit, since a delivery of said trunk as aforesaid (if the jury shall find such delivery) any possession of or control over, said trunk of the plaintiff, then the plaintiff is not entitled to recover in

this case as against this defendant the value of said trunk and its contents.[6]

II. Carriers of Freight.

Failure to transport goods—Property subject to quarantine.

(504) The court instructs the jury that if the jury believe from the evidence that defendant could not ship the cotton on account of yellow fever or any consequences arising from reports of the same, and if they further believe from the evidence that defendant knew it could not be shipped at the time the cotton was received and the bill of lading issued, and if they further find from the evidence that the defendant did not notify plaintiff at the time the cotton was received of such inability to ship the cotton and if they believe that plaintiff has been injured and that such injury would not have been received had the cotton been rejected, the jury should find for plaintiff.[7]

Liability as warehousemen—Goods received for immediate shipment.

(505) The court instructs the jury that if they find from the evidence that the goods were delivered to defendant for the purpose of immediate transportation, and without awaiting further orders from the shipper, that the carrier in holding the goods in question in storage does so as a carrier and not as a warehouseman; but if the jury finds from the facts that the goods were not to be immediately shipped, but were to be held for shipment until some future time, or until further orders were given, then the carrier in holding such goods in storage is a warehouseman and not a carrier.[8]

[6] Philadelphia, W. & B. R. Co. v. Harper, 29 Mo. 330; Harper v. Philadelphia, W. & B. R. Co., Id.

[7] Alabama & V. R. Co. v. Hayne & Co., 76 Miss. 538.

[8] Fitchburg v. Hannah, 6 Gray (Mass.) 539; Goodbar v. Wabash R. Co., 53 Mo. 434; Pittsburgh R. Co. v. Barrett, 36 Ohio St. 448; Clark v. Needles, 25 Pa. St. 338; St. Louis R. Co. v. Knight, 122 U. S. 79; Bannon v. Eldridge, 100 Mass. 457; Watts v. Boston R. Co., 106 Mass. 467.

Conclusiveness of bill of lading as to receipt of goods in good order.

(506) The court instructs the jury that if they believe, from the evidence, that the defendant received the grain claimed to be in a damaged condition when it arrived, and gave bills of lading acknowledging the receipt of such grain in apparent good order, then such bills of lading are *prima facie* evidence that the grain mentioned in such bills of lading was, at the time it was shipped, in good order and condition, and is binding on the defendant unless rebutted and to overcome such *prima facie* evidence, it is incumbent on the defendant to introduce such evidence as will show, to the satisfaction of the jury, that such grain was not, in fact, in good order and condition.[9]

Delay exposing goods to unprecedented flood.

(507) The court instructs the jury that if the jury find from the evidence before them that the defendant, its agents or employees, received the (car load of wheat) testified to in this case at (Shenandoah Junction) on (Wednesday, May 29th,) to be transported by defendant over its road from said (Shenandoah Junction) to (Washington in the district of Columbia) and at said (Washington) to be delivered by the defendant for the plaintiffs to W., subject to the terms and conditions of the printed contract offered in evidence and further find that said defendant, its agents or employees, transported said (car load of wheat) from said (Shenandoah Junction) to (Washington Junction) and at said (Washington Junction) side tracked said (car load of wheat) and further find that while said (car load of wheat) was standing upon said side track, said defendants, its agents or employees, had warning of the approaching flood whereby the (wheat) was damaged and further find

[9] Approved in Illinois Cent. R. Co. v. Cobb, Blaisdell & Co., 72 Ill. 148.

that said defendant, its agents or employees, notwithstanding such warning of danger, did not exercise ordinary skill, prudence, diligence and foresight to save said (car load of wheat) from being injured and damaged by the flood, and further find that by reason of said failure upon the part of said defendants, its agents or employees, to exercise said ordinary skill, prudence, diligence and foresight, said (car load of wheat) was caught and submerged by the flood and injured and damaged on (June 1st) then the plaintiffs are entitled to recover to the extent of the injury sustained.[10]

(508) The jury are instructed that if they find from the evidence before them that the damage to the (wheat) for which this action is brought was occasioned by a sudden high and extraordinary freshet in the (Potomac) river, which occurred the (last of May or the first of June, 1889,) overflowing and submerging the railroad track of the defendant at the (Washington junction of the Metropolitan branch road) where the (wheat) was then in a car on the tracks of said road, and that said freshet was the immediate and direct cause of the damage to the (wheat) as testified to by the witnesses, then the plaintiffs are not entitled to recover for such damage to the (wheat) although there may have been undue and unnecessary delay by the defendant in the transportation of said (wheat) to its place of destination previous to the occurrence of such damages thereto by the freshet, unless the jury believe from the evidence before them that the defendant could by reasonable exertion and diligence in the use of the means at its command after discovering the impending danger to the (wheat) from the rising flood, have saved the (wheat) from the injury by the water by moving the car to a place of safety or by the reasonable use of any other means in its power, have prevented such damage, but that the burden of proof of the want of diligence and care in this respect on the part of defendant

[10] Approved in Baltimore & O. R. Co. v. Keedy, 75 Md. 320.

rests with the plaintiffs. If, by the use of reasonable care and diligence after the freshet had subsided, the (wheat) or any portion thereof, could have been saved from ruin, it was the duty of the defendant so to save the same, and if any portion of the (wheat) was lost or ruined that could have been so saved, the defendant is liable therefor.[11]

Destruction of freight by fire.

(509) The court instructs the jury that if they believe, from the evidence, that defendant held the leather for shipment by its usual and customary route for shipping freights to P., and that such arrangement for shipment was reasonably prudent, and if the jury believes from the evidence, that defendant exercised reasonable care and diligence in keeping it for such shipment, then plaintiff is not entitled to recover, and the jury must find for the defendant.[12]

(510) The court instructs the jury that the law did not require the defendant to inform the plaintiff of the route over which it would ship the leather, and if the plaintiff did not give the defendant instructions over which route to ship the leather, then the law gave the defendant the right to ship the leather over the usual and customary route the defendant used to ship the goods from G. to P., if such route was reasonable and prudent.[13]

Validity of limitation of liability of connecting carrier.

(511) The court declares the law to be, that if they believe from the evidence that the plaintiff at the time of delivering the package in question to the defendant's agent received a receipt for the said package wherein it was expressly stipulated that the defendant would not be responsible for the same beyond the station of defendant nearest to M., to which place plaintiff desired the package to go and

[11] Approved in Baltimore & O. R. Co. v. Keedy, 75 Md. 320.
[12] Approved in Louisville & N. R. Co. v. Gidley, 119 Ala. 523.
[13] Approved in Louisville & N. R. Co. v. Gidley, 119 Ala. 523.

plaintiff's attention was called to or he knew of such underwritten limitation at the time, and that when it reached that point defendant was to deliver the package to others, and that S. was the nearest point on the route of defendant to M., and that defendant carried said package safely and in good order to S., and there delivered it to the ——— in good order to complete the transportation, then defendant was not liable any further, and the issues must be found for defendant.

The court declares the law to be that if they believe from the evidence that the plaintiff, at the time of delivering the package in question to the defendant's agent, received a receipt for the said package, wherein it was expressly stipulated that defendant would not be responsible for the same beyond the station of defendant nearest to M., to which place plaintiff desired the package to go and that when it reached that point defendant was to deliver the package to others to complete the transportation, and that S. was the nearest point on the route of defendant to M., and that defendant carried said package to S. safely and in good order, and then delivered it to the ——— in good order to complete the transportation, the defendant was not liable any further, and the issues must be found for defendant.

The court instructs the jury that the defendant in this case, being a common carrier, had the right to limit its responsibility by special contract, and if the jury believe from the evidence that the defendant made a special contract with the plaintiff, whereby it accepted said package upon the express condition that it was not to be responsible for the same beyond its line, and if they find that defendant carried said package safely to S., the terminus of its route, in the direction of M., the destination of the package and then delivered it to another responsible forwarder and carrier, then its responsibility ceased, and defendant is not responsible for any loss happening after that time.[14]

[14] Approved in Snider v. Adams Exp. Co., 63 Mo. 376.

Damages.

(512) The court instructs the jury that, you are further charged at the request of the defendant, that, if you believe from the evidence that if the plaintiff sustained any damages by any of said trees becoming wholly worthless before they arrived and were tendered to plaintiff at A., if not after they were so tendered, and while they were being transported to that place, or by any of said trees being partially damaged by reason of their delay in transportation while in defendant's hands, then the jury will estimate such damages as the evidence shows the plaintiff to have sustained, if any damages are shown, and return a verdict for such amount; but if the jury believe from the evidence that only a portion of said trees were damaged, and that within a reasonable time after said trees arrived at A. they were tendered to plaintiff, then it was the duty of plaintiff to accept said trees, and if you believe such tender was made to plaintiff, then he can only recover damages for such trees as were shown to have been totally worthless and damages for such other trees as were damaged at the time, if any were damaged.[15]

Liability for special damages.

(513) The court instructs the jury that, in order that the defendant may be rendered liable for the special damages claimed, that is the price which various persons had contracted to pay for the goods shipped on the delivery at ——— sought to be recovered in this case, the facts of the sale of such goods by plaintiff should have been brought to the attention of the defendant at the time such goods were delivered to it for shipment, and unless you find from the evidence, that defendant was so notified, or knew at the time said goods came into his hands of the special circumstances which made a quicker delivery necessary, or unless you find

[15] Approved in St. Louis S. W. R. Co. v. Cates, 15 Tex. Civ. App. 135.

from the evidence of the nature of the character of the freight, that defendant was charged with knowing that a quicker and speedy delivery thereof was important and necessary, you should not allow plaintiff the special damages claimed by him.[16]

Duty of consignee to prevent further injury after delay.

(514) The court instructs the jury at the request of defendant, that if you believe from the evidence in this case that the trees in question were tendered to plaintiff after their arrival at A., and that if plaintiff had received them he could have preserved them, or any part of them, by the use of proper care and attention, it was his duty to have done so, and if he suffered loss on account of such failure to preserve said trees, he cannot recover for such loss.[17]

Recovery back of freight.

(515) The court instructs the jury that if they find from the evidence in this case that the defendant filed with the interstate commerce commission its tariff rates on (hay) and that said tariff rates so filed with the said interstate commerce commission covered the tariff rate on (hay) from the station of (Cale, Indian Territory, to the city of St. Louis, Missouri,) and that said tariff rate on (hay) was printed and publicly posted at said station of (Cale) for the information and inspection of the public, and that in accordance with such tariff rate so filed with said interstate commerce commission, and so printed and posted, the rate on (hay) was fixed and established at (25 cents per 100) with a minimum weight of (20,000 pounds per car), and that such tariff rate was on file with the said interstate commerce commission at the time the (hay) in controversy was shipped, and that there had been no reduction in said tariff rate for a

[16] St. Louis S. W. R. Co. v. Cates, 15 Tex. Civ. App. 135.

[17] Approved in St. Louis S. W. R. Co. v. Cates, 15 Tex. Civ. App. 135.

period of three days before the shipment of the hay in controversy was made, and if you further find the defendant only collected from plaintiff an amount of money not exceeding the rate of (25 cents per 100, with a minimum of 20,000 pounds per car,) then you must find for the defendant in this case.[18]

Lien for freight on replevin by shipper to recover goods.

(516) The court instructs the jury that if the jury find the bill of lading offered in evidence, it was the duty of the master to unload the cargo on the wharf of the plaintiff, and until his duty was performed, the vessel's lien upon the cargo for the freight was only inchoate and conditional and if the jury find that after the arrival of the vessel at the plaintiff's wharf and before the cargo was so unloaded, the vessel was without notice to the plaintiff removed to a distant wharf of defendant for the purpose of being there unloaded, then the defendant had no such special property in the wood as to defeat this action and the plaintiff is entitled to a verdict and to recover such actual damage as the jury may find from the evidence he has sustained in consequence of such removal.[19]

III. Carriers of Live Stock.

Failure to furnish cars for transportation.

(517) The court instructs the jury that if the jury believe, from the evidence, that the defendant received from the plaintiff, on the ———, his cattle and hogs for transportation to, and delivery at, B., and that, at the time of the receipt of the stock, the road of defendant, and its connecting lines running to B. were so crowded with freight that they were unable to furnish cars within the usual time for the transportation of plaintiff's stock, then such crowded

[18] Approved in Missouri, K. & T. Ry. Co. v. Bowles (Ind. Ter.) 40 S. W. 899.

[19] Approved in McCullough v. Hellweg, 66 Md. 269.

condition of said road or roads would furnish no excuse for the defendant if plaintiff's stock was not delivered at B., in a reasonable time, if the jury believe the defendant was so bound to deliver.[20]

Liability for delay.

(518) The court instructs the jury that if you find from the testimony that said defendant, ——— Railway Company ——— received the cattle of plaintiff, as alleged, to be transported to ——— and you further find that while being so transported some of said cattle died and others were injured and damaged, and you further find that said defendant failed to transport said cattle over its line of road within a reasonable time, or failed to use ordinary care in the handling and transportation of said cattle, and you further find that such failure, if any, was negligence, and that such negligence of said defendant, if any, was the proximate cause of the injury and damage, if any, to plaintiff's cattle, then you are instructed to find for plaintiff, unless you find for defendant under instructions hereinafter given you.[21]

Implied contract to deliver at a certain time.

(519) The court instructs the jury that a common carrier does not guarantee the delivery of live stock received by it for transportation on any particular market, that is, on any particular market day.[22]

[20] Approved in Toledo, W. & W. R. Co. v. Lockhart, 71 Ill. 627.

[21] Approved in Missouri, K. & T. Ry. Co. of Texas v. Chittim, 24 Tex. Civ. App. 599.

[22] Approved in Norfolk & W. R. Co. v. Reeves, 97 Va. 284.

This instruction is properly given where the declaration does not allege notice to the carrier that the stock shall be shipped for a particular market, and in the case at bar, under such pleadings it was held that an amendment by the insertion of the words "Unless notified that the shipment was made for that market" was erroneous.

Liability for damage resulting from concealment of condition of cattle.

(520) The court instructs the jury that when the plaintiff offered his cattle to the defendant for shipment, it was the right of defendant's agent to make any inquiry as to their physical condition which he saw fit, and if upon such inquiry being made the plaintiff concealed facts relating to their physical condition, and thus preventing the defendant from exercising the care which the cattle of plaintiff in their peculiar physical condition were entitled to, plaintiff cannot recover, if the jury believe from the evidence that the injuries here sued for were caused partly by the peculiar and physical condition of the cattle of plaintiff.[23]

Duty of connecting carriers to deliver.

(521) The court instructs the jury that under the bill of lading read in evidence in this case, it was the duty of the defendant, upon the arrival of the (apples) at E., to deliver them to a connecting carrier, to be transported to their destination; and if the jury believe, from the evidence, that the defendant transported said (apples) to E. without unreasonable delay, and there delivered them to the ——— Company, a connecting carrier, for transportation to S., the place of their destination then the jury will find for the defendant.[24]

Liability of connecting carrier—Contributory negligence of plaintiff in loading stock.

(522) The court instructs the jury that the defendant, ——— Company ———, would only be liable for damages and injury, if any, done to said cattle by reason of the negligence, if any, of said company while said cattle were in

[23] McCune v. B. C. R. & N. R. Co., 52 Iowa, 600.

[24] Approved in Wabash, St. L. & P. R. Co. v. Jaggerman, 115 Ill. 407.

It would be improper to leave to the jury the question of what the contract was.

possession of said company and on its own line of road. The court instructs you that if you believe from the evidence that the plaintiff negligently overloaded the cattle in the cars for transportation to T., and that his negligence in that particular, if any, contributed to the damage suffered by his said cattle, if any, then you will return your verdict for the defendants, even though you may believe from the evidence that the defendants were negligent in handling plaintiff's cattle.[25]

Limitation of liability of connecting carriers.

(523) The court instructs the jury that if they find from the evidence that plaintiff delivered to the ——— Express Company in ——— a parcel for delivery at ———, where the charges for carriage were to be paid, and if they find from the evidence that plaintiff received and agreed to the terms of a bill of lading by which the ——— Express Company agreed to forward the goods to their agency most convenient to the destination, and there to deliver them to other parties to complete the transportation, and that such bill of lading limited the liability for injury to the sum of ——— dollars, unless the value of the goods was otherwise therein expressed, and if they find from the evidence that no value was given, and that the goods were turned over by the ——— Express Company to defendant, and by it delivered at ———, and found to be injured to the sum of ——— dollars, then, if the jury find such facts from the evidence, that the bill of lading was a through contract, and that defendant is entitled to the benefit of all exemptions contained in it, and not liable for a greater damage than the amount stipulated therein.[26]

[25] Approved in Missouri, K. & T. Ry. Co. of Texas v. Chittim, 24 Tex. Civ. App. 599.

[26] White v. Blair, 33 App. Div. 145.

Duty to make claim for damages within reasonable time.

(524) The court instructs the jury that if they believe from the evidence that the plaintiffs in this case entered into a written contract with the defendant to transport said stock in question (which was consigned to Media, Lancaster and Philadelphia, Pa.) to the terminus of its road, and there to deliver it to the connecting carrier, and that it was agreed between plaintiffs and said defendant in said contract that in case of loss and damage whereby any legal liability or responsibility should or might be incurred by the terms of said contract, that that company alone should be held responsible therefor in whose actual custody the live stock might be at the happening of such loss or damage, and if the jury further believe from the evidence that the northern terminal of the defendant's railroad is in H., Md., and that it safely and in a reasonable time delivered the said stock there to the C. V. railroad, and that the damage, if any, occurred after it had been so delivered to the connecting carrier, then they will find for the defendant, unless they believe from the evidence that the plaintiffs or their agents did, within a reasonable time after said delay or damage, if any, make demand upon the said defendant for satisfactory proof that said delay or damage did not occur while the said stock was in its possession.[27]

[27] Approved in Norfolk & W. Ry. Co. v. Reeves, 97 Va. 284.

This instruction is based on the provision in the bill of lading and on Code Va. § 1295: "When a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of its own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless at the time of such acceptance such carrier be released or exempted from such liability by contract in writing, signed by the owner or his agent; and although there be such contract in writing, if such thing be lost or injured, such common carrier shall himself be liable therefor, unless within a reasonable time after demand made he shall give such proof to the consignor that the loss or injury did not occur while the thing was in his charge."

IV. Carriers of Passengers.

A. Care required in general.

Degree of care required in general.

(525) The court instructs the jury that a common carrier of passengers is bound to use the utmost care and diligence for the safety of passengers, and is liable for an injury to a passenger occasioned by the slightest neglect against which human prudence and foresight might have guarded.[28]

(526) The court instructs the jury that the defendant is not an insurer of the safety of its passengers, and if the jury shall believe from the evidence that the defendant had provided reasonable facilities for the transportation of such passengers as might reasonably be expected to apply to be carried from ——— on the occasion in question, and that the cars were such as are in general use, and in good order and condition; that the track, switches, and frog at the point where the plaintiff was injured were in proper order and condition, and that the employees in charge of the train were experienced and competent men, and that the train in question was carried safely from ——— to ———, no negligence can be imputed to the defendant.[29]

(527) Railway companies, in transporting passengers upon their trains operated and managed by their employees, must, while thus transporting such passengers, exercise a high degree of care in order to avoid accident or injury to such passengers, and the failure to exercise such care as a person of ordinary prudence under like circumstances would use, is negligence.[30]

(528) The court instructs the jury that, it was the duty of the railroad company to use that high degree of care to avoid injury to the plaintiff, when she was about to alight from its train at M. on the occasion in question, which very

[28] Reynolds v. Richmond & M. Ry. Co., 92 Va. 400.

[29] Chesapeake & O. Ry. Co. v. Clowes, 93 Va. 189.

[30] Approved in Gulf, C. & S. F. Ry. Co. v. Wilson, 79 Tex. 371.

prudent, cautious and competent persons usually exercise under the same or similar circumstances as those then existing. It is a question of fact for the jury to determine whether the defendant's employees were guilty of the acts of which plaintiffs complain and whether such acts show that said employees failed to use the degree of care above defined or not.[31]

(529) If the injury to plaintiff was occasioned without her fault, by the least negligence or want of skill or prudence on the part of the defendant or its employees in charge of the train, the company is liable.[32]

(530) The court instructs the jury that the law, in tenderness to human life and limb, holds railroad companies liable for the slightest negligence, and compels them to repel by satisfactory proofs every imputation of such negligence. When carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. Any negligence or default in such case will make such carrier liable.[33]

Duty to exercise highest degree of care and caution.

(531) The court instructs the jury as a matter of law that it is the duty of a railroad company to use the highest degree of care and caution consistent with the practical operation of the road to provide for the safety and security of passengers while being transported.[34]

Liability of carrier or insurer.

(532) The court instructs the jury that railroad companies are not insurers of their passengers and are not liable for injuries which their passengers may receive while being carried, unless the carrier is guilty of negligence which was

[31] Approved in Houston & T. C. R. Co. v. Dotson, 15 Tex. Civ. App. 73.

[32] Approved in Curtis v. Detroit & M. R. Co., 27 Wis. 158.

[33] Approved in Shenandoah Val. R. Co. v. Moose, 83 Va. 827.

[34] Approved in West Chicago St. R. Co. v. Jonhson, 180 Ill. 285.

the proximate cause of the injury received and the passenger was free from negligence which contributed proximately to the injury of which he complains.[35]

(533) The duty of a carrier is to safely carry passengers. It is true that a carrier of passengers is not an insurer of the safety of those whom it undertakes to carry, against all the risks of travel, but, nevertheless, there rests upon such carrier this general duty of safely carrying.[36]

Liability for mere accident where there is no neglect of duty.

(534) The court instructs the jury that a railroad company, in the conduct and management of its trains, is required to employ skillful and competent agents, and to use such means and foresight in providing for the safety of passengers, as persons of the greatest care and prudence usually exercise in similar cases; and should an injury result to a passenger from a failure to use such a degree of care and prudence, the company will be responsible for such injury, unless it appears that the passenger so injured, by the use of ordinary care and prudence (that is, the ordinary care and prudence usually exercised by persons of ordinary caution in his condition and circumstances), could have avoided the injury. But a railroad company is not responsible for an injury to a passenger which is the result of a mere accident or casualty, where there is no want of care or skill on the part of the company or its agents.[37]

(535) The court instructs the jury, that if they believe from the evidence that the injury to plaintiff in this suit happened to her by mere accident, without any fault on the part of defendant or its employees, then the plaintiff cannot recover in this action, and they will find for the defendant.[38]

[35] Approved in Houston & T. C. R. Co. v. Dotson, 15 Tex. Civ. App. 73.

[36] Approved in Louisville, N. A. & C. R. Co. v. Wood, 133 Ind. 544.

[37] Approved in Houston & T. C. R. Co. v. Gorbett, 49 Tex. 573.

[38] Approved in Georgia Pac. R. Co. v. West, 66 Miss. 310.

Definition of negligence.

(536) The court instructs the jury that, negligence when applied to carriers of passengers, means the absence in the performance of a duty imposed by law for the protection of others, of that high degree of care in acting or refraining from acting which very cautious, prudent and competent persons usually exercise under the same or similar circumstances.[39]

(537) The court further instructs the jury that while the plaintiff was a passenger on defendant's train the defendant owed to her the duty to exercise that high degree of care for her personal safety that a very prudent person would exercise under the circumstances, and a failure, if any, to use such care would be negligence in the sense that the word "negligence" is used in the foregoing portions of this charge.[40]

Duty required of carrier's employees.

(538) The court instructs the jury that, it is the duty of a railroad company to convey its passengers safely, and it is the duty of the employees of the railroad company to exercise care and diligence in the exercise of their respective duties and any omission or failure to discharge fully all the obligations incumbent on said employees, is negligence, and if a passenger suffers injury by such negligence, the railroad company is liable therefor.[41]

Duty as to control and discipline of servants.

(539) The court instructs the jury that if they believe from the evidence that the plaintiff was a passenger on the defendant's train at the time of the alleged injury, then it

[39] Approved in Houston & T. C. R. Co. v. Dotson, 15 Tex. Civ. App. 73.

[40] Approved in Missouri, K. & T. Ry. Co. of Texas v. White, 22 Tex. Civ. App. 424.

[41] Approved in International & G. N. R. Co. v. Eckford, 71 Tex. 274.

was the duty of defendant by its officers and employees to use the utmost practicable care and diligence to carry plaintiff safely and securely to his destination, and the court further instructs the jury that defendant was bound to use all reasonable and practicable care and diligence to maintain among its employees, such a decree of order and discipline as might be requisite for the personal safety and security of the plaintiff and other passengers traveling on the same train and that said defendant was bound to have due supervision and control over the employees upon said train by its proper officers.[42]

Duty to protect passenger from improper and unnecessary violence of servants.

(540) If the plaintiff was a passenger upon defendant's road in one of defendant's coaches, as charged in her complaint, the defendant's obligation was to carry her safely and properly; and if the defendant intrusted this duty to the servants of the company, the law holds the defendant responsible for the manner in which they execute it. The carrier is obliged to protect its passengers from improper and unnecessary violence at the hands of its own servants. And it is the established law that a carrier is responsible for the negligence and wrongful conduct of its servants, suffered or done in the line of their employment, whereby a passenger is injured.[43]

Liability for unauthorized acts of servants.

(541) A carrier of passengers for pay is responsible for injuries sustained by a passenger through the neglect, recklessness and carelessness of the servants of such carrier, while such servants are engaged in the general scope of their em-

[42] Keokuk Northern Line Packet Co. v. True, 88 Ill. 608.

[43] Approved in Louisville, N. A. & C. R. Co. v. Wood, 133 Ind. 544.

ployment, whether the act was or was not, authorized by the master.[44]

Duty to anticipate passenger's negligence.

(542) The court instructs the jury that the law did not require defendant to anticipate or presume that plaintiff might be negligent. Defendant might lawfully presume the contrary; and might act upon the assumption that plaintiff would observe all due and proper precaution, according to the circumstances surrounding him.[45]

Care in construction and inspection of cars.

(543) The court instructs the jury that if you find, from the evidence, that the plaintiff's decedent, B., was a postal agent in charge of the United States mails, being carried by the defendant on its railroad, and that the car in which said B. and said mail was being carried ran off the railway track, and thereby killed said B. without any fault on his part, such facts would make a *prima facie* case of negligence, and would entitle the plaintiff to a verdict, unless you find that the defendant and those from whom it procured its cars, had used due care in constructing its cars, and had from time to time carefully inspected said cars to see if they remained in proper order, and had failed to find any defects in the same which contributed to said injury.[46]

Liability for defective cars of other companies.

(544) The court instructs the jury that if they find from the evidence that the car in which the plaintiff was injured was not the car or the actual property of the defendant, but was the property of another corporation and if they further find from the evidence that the car composed a part of the train in which the plaintiff and other passengers were to be

[44] Approved in Louisville, N. A. & C. R. Co. v. Wood, 133 Ind. 544.

[45] Approved in Curtis v. Detroit & M. R. Co., 27 Wis. 158.

[46] Approved in Ohio & M. Ry. Co. v. Voight, 122 Ind. 288.

transported upon their journey, and the plaintiff was injured while in that car, without any fault of his own, and by reason either of the defective construction of the car or by some negligence on the part of those having charge of the car, then the defendant is liable.[47]

Duty to foresee accident.

(545) The court instructs the jury that, if you find from the evidence that the accident was occasioned by a condition of things which the company could neither foresee nor provide against, then you should find for the defendant.[48]

(546) What the law demanded of the defendant is only that which men of skill and vigilance are capable of exercising before the happening of an accident, and not the adoption of extraordinary and prophetic measures of precaution, which the peculiar circumstances of the event may afterwards show might have prevented it.[49]

(547) The court instructs the jury that, it is for them to determine from the evidence whether defendant, prior to the accident, could reasonably have foreseen that it might happen, that in determining whether defendant was guilty of negligence the jury must consider whether prior to the accident, defendant had reasonable or probable ground to anticipate any accident at that point, to a passenger properly descending step by step from the platform of the car to the station platform.[50]

Instruction eliminating contributory negligence.

(548) The court instructs the jury that if, in view of all the facts and circumstances in evidence in this case, you believe the plaintiff was a passenger on defendant's train of cars and was injured, as alleged in his petition, and that said in-

[47] Approved in Pennsylvania Co. v. Roy, 102 U. S. 451.

[48] Approved in Bedford, S., O. & B. R. Co. v. Rainbolt, 99 Ind. 551.

[49] Approved in Curtis v. Detroit & M. R. Co., 27 Wis. 158.

[50] Delamatyr v. Milwaukee & P. R. Co., 24 Wis. 578.

jury was caused without any fault of his but on the contrary by the fault, carelessness and negligence of the agents and employees of the defendant in manner and form as set forth and charged in plaintiff's petition, you will find for the plaintiff, and you will state in your verdict the amount of damages you find from the evidence the plaintiff has sustained by reason of such wrongful act.[51]

(549) If plaintiff did not receive the injuries complained of by any contributing act of negligence or fault of her own, but was injured at the time complained of by the carelessness and negligence or fault of the defendant's servants, or one of them, committed in the general scope of employment as such servants or servant, the defendant is liable for such damages as she may have sustained by the injuries thus received.[52]

Liability to person traveling free.

(550) The court instructs the jury that if the defendants, by their servants, undertook to convey the plaintiff along the ——— Railroad, in the car ———, and while so conveying him, through the gross negligence of the servants of the company then and there employed on the said railroad the collision occurred, by which the plaintiff was injured, that the defendants are liable for the injury done to the plaintiff by such collision, although no compensation was to be paid to the company for such conveyance of the plaintiff.[53]

(551) The court instructs the jury that if the plaintiff was lawfully upon the railroad of the defendants at the time of the collision, by the license of the defendants, and was then and there injured by the negligence or disobedience

[51] Approved in International & G. N. R. Co. v. Eckford, 71 Tex. 274.

[52] Louisville, N. A. & C. R. Co. v. Wood, 133 Ind. 544.

[53] Approved in Philadelphia & R. R. Co. v. Derby, 14 How. (55 U. S.) 468.

of orders of the company's servants, then and there employed on the said railroad, the defendants are liable for the injury done to the plaintiff by such collision.[54]

(552) The court instructs the jury that if the collision, by which the plaintiff was injured, was occasioned by the locomotive L. then driven negligently or in disobedience of orders upon the said road by ———, one of the company's servants, then having control or command of the said locomotive, that the defendants are liable for the injury to the plaintiff, caused by such collision.[55]

Negligence in the operation of trains over tracks which passenger must cross in order to change cars.

(553) The court instructs the jury that if they find from the evidence that on the ——— day of ——— 19—, ——— was a passenger in the cars of defendant with a ticket entitling him to ride from ——— to ———, that he took the train at ——— and rode thereon to ——— where it became necessary for him to change cars, and if they find from the evidence that in alighting from the train on which he was and passing over certain tracks of defendants' road, to take the train by which he was to continue his journey to ———, he was killed by the locomotive and cars of a freight train of the defendant while operated by defendant's agents on its road, and if they find from the evidence that his killing resulted directly from the want of the exercise of ordinary care and prudence upon the part of the agents of the defendant, and not from the want of ordinary care and prudence of the deceased contributing to the accident, then plaintiffs are entitled to a verdict.[56]

[54] Approved in Philadelphia & R. R. Co. v. Derby, 14 How. (55 U. S.) 468.

[55] Approved in Philadelphia & R. R. Co. v. Derby, 14 How. (55 U. S.) 468.

[56] Approved in Baltimore & O. R. Co. v. State to use of Hauer, 60 Md. 449.

(554) The court instructs the jury that though they find from the evidence that ——— was guilty of the want of ordinary care and prudence in crossing the track of defendant to take the train to his point of destination, yet if they further find from the evidence that if the agents of defendant had used in and about the running of the freight train that injured ——— ordinary prudence and care in giving reasonable and usual signals of its approach, in keeping a reasonable look-out and in heeding the danger signals from the station at ———, if they find that such signals were given, or in giving the danger signal to the approaching freight train, that such said accident would not have occurred, then plaintiffs are entitled to recovery.[57]

B. THE RELATION OF CARRIER AND PASSENGER.

Person coming to station to board train.

(555) The court instructs the jury that to become a passenger and entitled to protection as such, it is not necessary that a person shall have entered a train or paid his fare, but he is a passenger as soon as he comes within the control of the carrier at the station through any of the usual approaches, with the intent to become a passenger, and the court therefore further instructs the jury that if they believe from the evidence that the plaintiff, ——— on the ——— day of ——— went to the defendant's depot at the town of ——— by one of the usual routes thereto, for the purpose and with the intention of taking the next train, and stepped upon the platform of said depot with the intention and purpose of becoming such passenger, the plaintiff then became, in contemplation of law, a passenger of the defendant, provided she came to said depot and platform within

[57] Approved in Baltimore & O. R. Co. v. State to use of Hauer, 60 Md. 449.

This instruction was in an action for the killing of plaintiff's intestate and should be given in connection with instruction showing plaintiff's equitable right to recover.

a reasonable time before the time for the departure of said train, whether or not she had purchased a ticket from the defendant or its agent.[58]

Effect of leaving train open for reception of passengers.

(556) The court instructs the jury that if you should find from the testimony that the night freight train in question was usually made up and started from the place where it stood when the party having charge of the plaintiff attempted to go on board, and that the defendant company, its agents or servants, had previous to and about that time, carried such passengers in this night train, to and from ———, as went aboard of their own accord, or upon application to some person having charge of the train, collecting from such person the usual fare of passengers, and further find that the caboose on the night in question, and at the time the party having charge of the plaintiff went aboard, was open for passengers, you will be warranted in finding a verdict for plaintiff; if you still further find the absence of negligence upon the part of said party in the care bestowed upon the boy, and the existence of negligence at the time upon the part of the employees of the defendant having charge of the train.[59]

Persons taking freight trains on which there is a custom to carry passengers.

(557) The court instructs the jury that if they find from the evidence that previous to and upon the night in question,

[58] Approved in Barker v. Ohio River R. Co., 51 W. Va. 423.

[59] Approved in Lucas v. Milwaukee & St. P. Ry. Co., 33 Wis. 41 This instruction as given also contained the following addition: "And I will here add, that unless you do find the existence of the facts to which I have above alluded, I hardly see how, in view of the evidence, you are to find a verdict for the plaintiff, unless you find that they went aboard by direction of an employee of the defendant, having authority to give such direction, without negligence on their part."

this train had been and was carrying passengers and receiving fare, and if the jury should believe from all the facts and circumstances that the party, in consequence of it, went there to take it, they were neither trespassers nor outlaws. And if they were conducting themselves in a prudent manner in attempting to get aboard the train, and the boy was injured in consequence of the want of ordinary skill and care upon the part of the employees of the defendant, the defendant is liable.[60]

Right of mail clerk to recover for negligence.

(558) If you find and believe from the evidence that on the ——— day of ———, or at any time within one year next before the ——— day of ———, 19—, a train of cars operated by the defendant company, its agents, servants or employees was wrecked in B. county, T., near V., and that at the time of such wreck, the plaintiff was traveling upon said train of cars as postal or mail clerk in the employment of the United States government, and in charge of the mail matter of such train, then he would be entitled to recover of defendant company for such injuries as he may have received, provided they are such as are set forth in his petition, as resulted from the negligence (if there was negligence) of said company's servants, agents or employees, not to exceed the amount of either kind of injury alleged in the different allegations in the plaintiff's petition.[61]

Express messenger—Injury from explosion of locomotive boiler.

(559) The court instructs the jury that if they believe from the evidence that the defendants were negligent in the transportation of passengers from S. to P. and from P. to S., before and during the month of ———, A. D. 19—, that during the same periods of time, W. & Co., employed the plaintiff to carry their express matter between said place and

[60] Approved in Lucas v. Milwaukee & St. P. Ry. Co., 33 Wis. 41.
[61] Approved in Gulf, C. & S. F. Ry. Co. v. Wilson, 79 Tex. 371.

paid the defendants to transport said express matter for a certain sum of money per month, and said plaintiff and said defendant entered upon said arrangement and were engaged in the same during said period of time and that it was understood and agreed between said defendants and W. & Co., that the plaintiff as their messenger should be transported with their said express matter from S. to P. and from P. to S. during said period of time, and that the defendants made such transportation by cars propelled by steam and a steamer and that said cars started from the town of P.; that while thus engaged the plaintiff during said period of time came to said cars, at the depot thereof, for the purpose of going to S., that he was standing on the platform of said defendants, near said cars for the purpose of stepping into a car of defendants (and that said platform was usually used by passengers departing or arriving by said cars) when the boiler of the locomotive attached to said cars exploded through the negligence or carelessness of the engineer employed by the defendants, who was then in charge of said locomotive, and the plaintiff was injured thereby (the plaintiff not being guilty of any negligence which contributed to his injury) then the plaintiff is entitled to recover damages for such injury.[62]

Person attempting to ride on ticket purchased from scalper.

(560) The court instructs the jury that, if you find from the testimony that the ticket in question in this case was a third class or "emigrant" ticket, which had been sold at a reduced rate to a person in San Francisco other than the plaintiff, and said ticket was by its terms not transferable, and the purchaser thereof in San Francisco, in part consideration of such sale at a reduced price, agreed that it should not be transferable, and you further find that the plaintiff

[62] Approved in Yeomans v. Contra Costa Steam Nav. Co., 44 Cal. 71.

purchased in Omaha from some person other than defendants or their authorized agent, and offered and attempted to use it as entitling him to passage from Omaha to Chicago, on the defendant's road and refused to pay his fare on the defendant's road, and did not pay his fare, then the defendants are not under obligations to allow the plaintiff to ride upon such ticket and upon such refusal to pay fare, had a right to require plaintiff to leave the train and he can recover no damages based on the fact that he was so required to leave.[63]

(561) The court instructs the jury, that the taking up of the plaintiff's ticket, however, was a wrongful act on the part of the defendants for which they are liable to plaintiff.[64]

(562) The court instructs the jury that the measure of damage to which the plaintiff is entitled for the taking of such ticket would be the value thereof, which would not exceed the price of a third class or emigrant passage from Omaha to Boston with interest on the first day of this term.[65]

Where it is contended that plaintiff's intestate was a trespasser.

(563) The court instructs the jury that the right of the plaintiff to recover in this case will be submitted to you from two aspects, viz: (1) Was ———, at the time, a passenger on defendant's train? or (2) was he a trespasser? The law imposes upon the defendant company the duty of exercising the highest degree of care towards him, if he was a passenger for pay on defendant's cars at the time; but, if he was a trespasser on the defendant's train, the law imposes only the duty of ordinary care for his safety after discovering that he was such trespasser. Now, if, from all the facts and circumstances before you, you find that at the time ——— was killed, he was a passenger on defendant's cars, and that his death was caused or occasioned by the careless-

[63] Post v. Chicago & N. W. R. Co., 14 Neb. 110.

[64] Approved in Post v. Chicago & N. W. R. Co., 14 Neb. 110.

[65] Approved in Post v. Chicago & N. W. R. Co., 14 Neb. 110.

ness of those in charge of the train at the time (that is, if you find that the head-end collision which resulted in ———'s death was brought about through the carelessness and negligence and want of proper care on the part of those operating the trains at the time), then the defendant company would be liable in this case. If you find and believe that ——— at the time was a trespasser on defendant's train; that he at the time was riding on what is commonly known as the "blind baggage," endeavoring to travel without paying for his passage; and you further find and believe that a person of ordinary prudence and caution would not have been in such position, and would not have acted as ——— did at the time he boarded the train,—then, if you find this to be the case, the defendant company would not be liable, unless you further find and believe that the servants and agents of the defendant company knew of his position before the accident, and could have prevented the accident by the exercise of ordinary care. The law devolves upon the plaintiff the duty and burden of making out her case as alleged, and showing her right to a recovery by a fair preponderance of the evidence. When she has done this, then the burden is upon the defendant company to show that the deceased at the time did not act as a person of ordinary prudence and caution would have acted, or was in a place or position where an ordinarily prudent and cautious person would not have been, before plaintiff could be denied a recovery.[66]

Through contract of transportation—Liability for accident on connecting line.

(564) If you find from the evidence in this case that the plaintiff, or her husband in her behalf, applied to the agent or person in charge of the station office situated on the defendant's right of way at W. for a ticket for her transporta-

[66] Approved in Southerland v. Texas & P. Ry. Co. (Tex. Civ. App.) 40 S. W. 193.

tion to E., and that such agent or person so in charge of said station office, in response to such application, sold her, or her husband in her behalf a local book ticket for her transportation to E., and that she boarded a passenger car running upon defendant's line of road, in pursuance of the direction of persons in charge of said car, the ordinary carriage of passengers riding over said road, or of the train of cars, and that the same was used for and continued in said car without changing cars until she reached her destination at Elkhorn, such facts would constitute a valid and binding contract and undertaking by the defendant to safely carry the plaintiff from W. to E., notwithstanding the fact that E. is not situated upon defendant's line of railroad, and is situated upon the ——— Railroad at a point several miles beyond the terminus of the defendant's road and the liability of this defendant in such case would be the same, neither greater nor less than if such injury had occurred at a station on their own line of road.[67]

When relation terminates.

(565) A railroad company, carrying passengers for hire, has not discharged its duty or relieved itself from liability to them till it has stopped at the end of their journey a reasonable time for them to get off the train in safety.[68]

Burden of proof.

(566) The court instructs the jury that the plaintiff cannot recover as a passenger of defendant without showing that he occupied that relation to the defendant.[69]

C. EJECTION OF PASSENGERS.

Ejection of passenger refusing to pay fare.

(567) The court instructs the jury that if they believe

[67] Approved in Omaha & R. V. Ry. Co. v. Chollette, 33 Neb. 143.

[68] Approved in Louisville, N. A. & C. R. Co. v. Wood, 133 Ind. 544.

[69] Approved in Lucas v. Milwaukee & St. P. Ry. Co., 33 Wis. 41.

from the evidence, that the plaintiff had not paid or offered to pay his fare from ——— to ———, and if the jury believe from the evidence that at the time of the refusal to pay his fare, the train upon which plaintiff was traveling was in motion, then the jury are instructed that defendant would not be warranted in throwing plaintiff from the train in a way to endanger his life or limb.[70]

Ejection of passenger on failure to exhibit ticket.

(568) The court instructs the jury that if the jury believe from the evidence that plaintiff took a seat on the ——— train from M. to R. on the ——— day of ——— 19—, and refused to pay the usual fare or to furnish the conductor the usual ticket entitling him to one seat from M. to R., but claiming a seat by virtue of a special contract with the defendant company, which he failed to exhibit to the conductor and was in consequence thereof expelled from the train by the conductor, using no unnecessary force to do so, then they must find for the defendant.[71]

Reasonableness of rule requiring surrender of ticket.

(569) The court instructs the jury that the regulation of the defendant requiring the delivery of their tickets by passengers on demand of the conductor, without furnishing to the passenger surrendering his ticket a check or some other evidence of his right to passage, is a reasonable one, and if the jury believe from the evidence that the plaintiff refused to surrender his ticket upon demand of the conductor, unless some evidence was given to him of his right to continue as a passenger, and on refusal of the plaintiff to obey the regulation, the conductor required the plaintiff to leave the train at the next station, using no unnecessary violence, then the jury are instructed that defendant is not liable.[72]

[70] Michigan S. & N. I. R. Co. v. Shelton, 66 Ill. 424.
[71] Approved in Knopf v. Richmond, F. & P. R. Co., 85 Va. 769.
[72] Vedder v. Fellows, 20 N. Y. 126.

Reasonableness of regulation requiring payment of extra charge where tickets are not procured.

(570) The court instructs the jury that railroad companies have the right to adopt reasonable rules as to the methods of paying fare by passengers who use their passenger trains for the purpose of being transported from one place to another and to discriminate between fares paid on board their trains and at stations, and to remove from their cars in a proper manner and at a proper place persons who refuse to comply with such regulations; and the court instructs the jury that a regulation is reasonable which requires passengers who do not procure tickets at stations where tickets are sold before boarding their trains and commencing their journey to pay an extra amount of fare, and which provides that coupons shall be given the passenger on which he may collect the extra fare from any agent at a station, and which exempts from its operation such passengers as board their trains at stations where tickets are not sold.[73]

Effect of requiring extra charge as increasing rate of fare beyond statutory limit.

(571) The court instructs the jury that railroad companies may make regulations requiring payment of an extra charge where passengers do not procure tickets before boarding their trains, provided passengers are given a convenient place and sufficient opportunity to procure tickets previous to boarding the train to become passengers, and that such regulations are not unreasonable or oppressive or open to objection that the excess so imposed as a part of the fare makes the fare charged higher than the rate alleged by law which in this state by statute is ——— cents per mile.[74]

Duty to stop freight train at passenger station.

(572) The court instructs the jury that if they believe

[73] Kibler v. Southern Ry. Co., 62 S. C. 252.

[74] Approved in Kibler v. Southern Ry. Co., 62 S. C. 252.

from the evidence that plaintiff procured a first-class ticket from ——— to ——— and entered defendant's freight train on which passengers were carried by defendant for the purpose of being carried from ——— to ——— and that plaintiff did not have a ticket permitting him to travel upon the freight train as provided by the regulations of defendant and plaintiff was ejected by the conductor at the usual stopping place for passengers on freight trains and the defendant used no unnecessary violence in requiring the plaintiff to leave the train, you will find for the defendant and the jury are instructed that what is the usual stopping place for passengers on a freight train is a question for the jury to decide and that unless it appears from the evidence that it was the custom of freight trains on defendant's line to receive and discharge passengers on the platform of the passenger depot, defendant was not under obligation to eject plaintiff at the passenger depot.[75]

Questions for jury as to proper place of stopping train.

(573) The court instructs the jury that if they believe from the evidence that plaintiff procured a first-class ticket from ——— to ——— and entered defendant's freight cars, on which passengers were usually carried by defendants, for the purpose of being carried from ——— to ——— and plaintiff did not have a ticket permitting him to travel as a passenger upon the freight train as required by the regulations of defendant, and that plaintiff was ejected by the conductor at a place other than the usual stopping place for passengers, you will find for the plaintiff, and it is for the jury to say whether the passenger platform was the usual place of getting on and off of the freight train.[76]

Expulsion of passengers on freight train who have not secured tickets.

(574) The court instructs the jury that railroad compa-

[75] Illinois Cent. R. Co. v. Nelson, 59 Ill. 110.
[76] Illinois Cent. R. Co. v. Nelson, 59 Ill. 110.

nies as carriers of passengers can adopt all reasonable rules and regulations necessary and proper for the management of their roads, among which are rules requiring passengers to obtain from depot agents tickets entitling them to transportation, or to pay the usual fare to the conductor on the train and upon the failure or refusal of the passenger to comply with either one of those requirements, they have a right to expel them from the train, using no more force than may be necessary to do so.[77]

Right of carrier to make rules concerning stops and to eject passenger from train not stopping at his point of destination.

(575) The court instructs the jury that the proof shows that the railroad company runs two daily trains between points named in plaintiff's ticket and the regulation that one of these trains shall not stop at all stations is a reasonable regulation and one they had a right to make. A passenger who travels on said road with notice of such regulation cannot get on a through train and demand to be carried to a point at which said through train does not stop, even if he has a ticket to such point, unless he goes on the train by direction of the railroad company's agents. If the person who acted as agent, and sold tickets, directed the plaintiff to get on the through train, he had a right to get on said train and travel upon it; but if, after getting on, he was at a regular station notified that the train would not stop at E., his destination, it was his duty then to get off and take the proper train; for if the railroad agent at J. his point of departure made a mistake, the railroad had a right to correct the mistake at any regular stopping station for that train. If, then, he was informed at P. of the mistake, it was his duty to get off and if he did not do so, the conductor had a right to put him off in a proper manner.[78]

[77] Approved in Knopf v. Richmond, F. & P. R. Co., 85 Va. 759.

[78] Approved in I. & G. N. R. Co. v. Hassell, 62 Tex. 256.

Right of passenger having through ticket to stop over.

(576) The court instructs the jury that if the jury shall find from the evidence that the plaintiff on the first day of ———, 19—, purchased at N. a through ticket from that place to B. over the N. railroad and P. W. & B. R. railroad, and on that day proceeded on his journey as far as P., on the last-named road, where he left the train, and if the jury shall further find that after passing O.———, the then conductor of the train took up said through ticket and gave plaintiff a check in lieu thereof, which has been offered in evidence; and if the jury shall further find that the plaintiff on the ——— day of said ——— got upon the defendant's train for B. at H., and the then conductor refused to take said check, but informed the plaintiff that he must pay his fare to B., or he would be obliged to stop the cars and put him off, and that the defendant refused to pay said fare, and the said plaintiff was then put off, then the plaintiff is not entitled to recover in this case, provided the jury shall find that no more force than was necessary was used in putting said plaintiff off the train, even if the jury shall further find, that on arriving at P. on the train, on the said first day of ———, the plaintiff inquired from a man at the window of the ticket office of the defendant at that place, whether said check would be good to take him to B. another day and was told by said man that it would.[79]

Manner and place of expulsion.

(577) The court instructs the jury that railroad companies have the right to demand and receive legal rates of fare from persons traveling on their trains; and, in the event of the refusal of a passenger to pay his fare or show a ticket, conductors of a train have a right to eject such a passenger from the train, without using any more force or violence than may be necessary, to overcome any unlawful resistance which

[79] Approved in McClure v. Philadelphia, W. & B. R. Co., 34 Md. 532.

such passenger may offer. It is the duty of the conductor to bring the train to a full stop before compelling the party to be ejected to step from the train, and exercise such ordinary care in ejecting him as an ordinarily prudent man would exercise under similar circumstances as connected with this case. In this state it is not necessary that the train should be at a station in order to justify the ejection of a person refusing to pay fare, but a conductor has the right to eject such a person between stations at points where the situation of the ground is such as not to expose the person ejected to special risks of danger.[80]

Liability for injury to passenger sustained in resisting expulsion.

(578) The court instructs the jury that passengers must observe proper decorum and submit themselves to all reasonable rules established by the company and that passengers cannot interpose resistance to every trivial imposition to which they may feel themselves or imagine themselves exposed by the employees of the carrier and that it is due to good order and the comfort of the other passengers that a passenger should submit himself for the time being to what he may believe to be annoyances and redress his grievances, whatever they may be, by a civil action, and if the jury believe from the evidence that the plaintiff was called upon to pay his fare by the conductor of the defendant and that the plaintiff had actually paid his fare to the destination to which he wished to go, and that defendant's conductor honestly believed that plaintiff had not paid his fare, then it was plaintiff's duty to pay the fare to defendant and if the jury believe from the evidence that plaintiff refused to pay and interposed physical violence to prevent his ejection from the train by the conductor of the defendant on his refusal to pay his fare, then the jury are instructed that for any injuries

[80] Approved in Brown v. C., R. I. & P. R. Co., 51 Iowa, 235.

which the plaintiff may have suffered because of such interposition of physical force, plaintiff cannot recover.[81]

Right to expel disorderly passenger and secure arrest after expulsion.

(579) The court instructs the jury that it was the duty of the plaintiff to behave in a quiet and orderly manner while a passenger on the train of the defendant and that it was the duty of the conductor to sustain order on said train, and if the plaintiff was acting in a disorderly manner on said train, the conductor could eject him from said train; and if the jury find that the plaintiff, while a passenger on said train, was acting in a disorderly manner and was threatened with expulsion from said train by the conductor, and that on account of the companionship of the plaintiff with other persons, who were also disorderly and riotous, the conductor could not properly make the attempt to expel the plaintiff from the train, as the plaintiff and his companions stated that they would resist any attempt to expel them from the train, that then the conductor was justified in requesting the first police officer whom he could find to arrest the plaintiff; and if the jury find that the police officer at the W. Depot was the first police officer the conductor saw, and that the conductor used due diligence in procuring a police officer, and that the conductor directed the police officer to arrest the plaintiff for said disorderly conduct, that the defendant is not liable for this arrest and the verdict of the jury must be for the defendant.[82]

Question of fact as to existence of carrier's rules.

(580) The court instructs the jury that they must determine from the evidence whether there was a regulation requiring an extra charge from passengers not procuring tickets before boarding defendant's trains, and they must find

[81] Chicago, B. & Q. R. Co. v. Griffin, 68 Ill. 499.

[82] Approved in Baltimore & O. R. Co. v. Cain, 81 Md. 87.

how long it had been in operation, if it had been in operation at all, and whether its posting if it had been posted, was such as to advise the traveling public of its existence, these being questions of fact which the jury are to determine from the evidence.[83]

D. TAKING ON PASSENGERS.

Discharge of carrier's duty by drawing up in usual manner.

(581) If the evidence shows defendant to have moved the train to the station in the mode usual upon the well-regulated roads of the country, and practiced by good conductors and engineers, the observing of such usual mode cannot be deemed an act of negligence.[84]

Making misleading stop before final stop at station.

(582) It is not necessarily an act of negligence on the part of defendant to suffer a momentary arrest of motion of the cars in bringing the train to the station and to its proper and convenient location. If such temporary arrest of motion is incident to the careful management of a mixed train like the one in question, then to suffer it would not be an act of negligence.[85]

(583) If a train, in being brought up to the station, came to a stop in such a manner as to induce the belief, on the part of the passengers in waiting on the platform, that it had stopped for the reception of passengers, and then, when the passengers, acting on this belief, were going aboard, started again without caution or signal given, that would constitute an act of negligence on the part of the defendants; and it would make no difference whether, in so starting the train, it was intended to proceed to the next station, or merely to locate it more conveniently at the same station.[86]

[83] Kibler v. Southern Ry. Co., 62 S. C. 252.
[84] Approved in Curtis v. Detroit & M. R. Co., 27 Wis. 158.
[85] Approved in Curtis v. Detroit & M. R. Co., 27 Wis. 158.
[86] Approved in Curtis v. Detroit & M. R. Co., 27 Wis. 158.

Directions of employees inducing passenger to attempt to board train.

(584) If you believe from the evidence that the train had not come to a full stop, but that the stop during which the plaintiffs attempted to go on board, was one which resulted from checking the speed of the train in bringing it up to the station, yet if the passengers were directed to go on board by the men in charge of the train, the plaintiffs had a right to assume that the train was ready for their reception, and cannot be charged with negligence in following that direction, provided the train, where they attempted to enter, was actually still at the time; and if the cars were not ready for the reception of passengers, it was a clear act of negligence in the company's servant to tell them to go on board.[87]

Duty of passenger to obey warnings of carrier's servants.

(585) If the conductor warned the passengers to keep away from the train, it was the plaintiff's duty to have heeded such warnings and if she attempted to board the train before it had apparently reached its location at the platform, and when it was apparent that it had not reached said location, she was guilty of negligence, and cannot recover.[88]

Duty to assist passenger to board train.

(586) Whether it was the duty of defendant's agent to have assisted plaintiff in getting on the car, is a question for you to determine (from the instructions here given), from the evidence in the case; and, to this end, it is proper for you to consider the train and the car, their distance from the platform and depot, the facility with which access could be had, the sex, the age and inexperience of the plaintiff, if these were known to defendant's agent, and all the facts and circumstances surrounding the case.[89]

[87] Approved in Curtis v. Detroit & M. R. Co., 27 Wis. 158.
[88] Approved in Curtis v. Detroit & M. R. Co., 27 Wis. 158.
[89] Approved in Allender v. C. R. I. & P. R. Co., 43 Iowa, 276.

Taking on passengers at out-of-the-way places.

(587) The court instructs the jury that when the carrier of passengers by railway does not receive passengers into the car at the platform erected for that purpose, and suffers or directs passengers to enter at out-of-the-way places, it is its duty to use the utmost care in preventing accidents to passengers while entering. And if you find in this case that the defendant's agents were negligent, within the meaning of this instruction, and that plaintiff was injured thereby, still the question remains whether or not the plaintiff on her part contributed by her own negligence to the injury, and if you find she did so contribute she cannot recover. If she did not contribute she can recover.[90]

Effect of train being behind time.

(588) The circumstance that the train was behind its usual time has no significance or relevancy in this case, unless that circumstance directly or proximately contributed to the accident and injury complained of.[91]

Duty to protect passenger from injury from trains on adjoining tracks.

(589) When a railroad company receives its passengers from a space between parallel tracks, it is bound to provide such safeguards as will protect passengers in the exercise of ordinary care from injury from a passing train, and if it fail to do this, whether its negligence consists in its failure to provide proper platforms, or failure to notify passengers who have gone between its tracks to enter its cars on the approach of a train on a track parallel to that on which a passenger train is standing, and an injury result from said failure to one of its passengers who is about to enter its car, without contributory negligence on the part of said passenger, the company is liable therefor.[92]

[90] Approved in Allender v. C. R. I. & P. R. Co., 43 Iowa, 276.
[91] Curtis v. Detroit & M. R. Co., 27 Wis. 158.
[92] Approved in Union Pac. Ry. Co. v. Sue, 25 Neb. 772.

Starting while passenger is en route to seat.

(590) The court instructs the jury that it was not the duty of defendant to wait before starting its car until plaintiff had walked to the forward part of the car, if there was a seat for plaintiff nearer than that.[93]

Invitation to passenger to cross the tracks at station.

(591) The court instructs the jury that if they find from the evidence that it was necessary for the deceased in order to take the train to the point of his destination then on the south track of defendant's road at ——— to cross the north track of defendant's road, and that the train which he desired to take was engaged in receiving and discharging passengers, all of whom were compelled to cross said north track in going either to or from said train, and if the jury find from the evidence that passengers were passing and did pass across said north track, then the deceased had the right to consider that these circumstances amounted to an implied invitation on the part of the defendant to the deceased to cross the said north track and to imply assurance that it would be safe for him to do so.[94]

E. CARE AS TO STATIONS, TRACKS, AND EQUIPMENT.

Necessity of furnishing platform.

(592) The court instructs the jury that if they believe from the evidence that at the time of the plaintiff's being injured there was no platform or other proper landing-place at the train's stopping place at ———, and the defendant's servants did not assist the plaintiff to alight, and, for want of such platform or landing-place and assistance in alighting, the plaintiff was injured, without fault on her part, then the jury must find for the plaintiff.[94a]

[93] Dougherty v. Missouri R. Co., 97 Mo. 647.

[94] Approved in Baltimore & O. R. Co. v. State to use of Hauer, 60 Md. 449.

[94a] Approved in Alexandria & F. R. Co. v. Herndon, 87 Va. 193.

Requisite length of platform.

(593) The defendant is bound to provide safe and sufficient platforms for the landing of passengers, of sufficient length to afford safe egress to passengers from an ordinary train.[95]

Duty to protect persons on platform.

(594) The court instructs the jury that it is claimed on the part of the plaintiffs, that the defendant was negligent in not having a reasonably safe platform, in not having the platform sufficiently lighted, and in not having some person stationed at the point where this accident occurred, to warn persons and prevent their walking off the platform. The court instructs the jury that it will be the duty of the jury to determine, from all the testimony in the case, whether the defendant was negligent in these respects or either of them. It is the duty of the defendant to have its platform reasonably sufficient and safe in all respects to be used by such persons as may have lawful occasion to use it. It is not necessary that it should be perfectly and absolutely safe; so great a degree of perfection is usually impracticable. But it must be reasonably safe and sufficient for all persons using it, who are themselves in the exercise of ordinary and reasonable care. The court instructs the jury that if a barrier or guard is reasonably necessary to prevent persons, who are themselves in the exercise of ordinary and reasonable care, from falling from the platform to their injury, then a barrier should be placed upon it, or a guard should be placed to warn people of danger. Such lights as are necessary to render the use of the platform and the passage over it to the cars reasonably safe, should be upon the platform at the time of the arrival of trains, and during the time the train remains at the station.[96]

[95] Approved in St. Louis, I. M. & S. R. Co. v. Cantrell, 37 Ark. 519.

[96] Approved in Quaife v. Chicago & N. W. Ry. Co., 48 Wis. 513.

Duty to light platform.

(595) The jury should find for the defendant, unless they believe from all the evidence that the accommodations provided by defendants for passengers arriving at ——— of ordinary intelligence and prudence were unsafe, or that on the night of the accident to the plaintiff, the defendant's agents were negligent in properly lighting the premises, and shall further believe that the plaintiff did not contribute to the accident by her own negligence, or want of such care and caution as a reasonably prudent person should have exercised for his own protection.[97]

(596) The court further instructs the jury that if they believe from the evidence the night on which the plaintiff was injured was intensely dark, (and the vision of the plaintiff was further obstructed by a fierce snowstorm that was raging at the time), and that the defendant failed to light the station or stopping place at ——— and that in consequence of the defendant's failure to so light the station or stopping place at ——— the plaintiff, in attempting to alight from defendant's train, fell and was injured, without fault on her part, then the jury must find for the plaintiff.[98]

Effect of long-continued use of platform.

(597) The court instructs the jury that if they find from the evidence that defendant had for several years before the accident, used the platform at ——— and received passengers descending from the same car that plaintiff attempted to descend from, and if during all that time passengers had daily landed from said car on said platform without receiving injury, such facts may be considered by the jury as tending to negative any negligence on defendant's part in using said platform in connection with said car.[99]

[97] Reed v. Axtell, 84 Va. 231.

[98] Approved in Alexandria & F. R. Co. v. Herndon, 87 Va. 193.

[99] Delamatyr v. Milwaukee & P. R. Co., 24 Wis. 578.

Construction and inspection of bridges.

(598) The court instructs the jury that if you find from the evidence that the immediate cause of the alleged disaster was the want of the proper construction of said bridge over ——— river, either as to size, material, piers, or the adjustment thereof, then you should find for the plaintiff, unless you should further find that the size and construction of said bridge were right and proper for the use intended, and that the material in said bridge had been properly tested, by tests known to men skilled in such material, or could not be so tested and preserve the strength of said material, and said disaster was caused by a defect in said material which could neither be foreseen nor provided against by human foresight and care, then you should find for the defendant.[100]

Duty to inspect and replace ties.

(599) The court instructs the jury as to the alleged negligence of the defendant in failing to keep its track in proper repair, that it is claimed on the part of the plaintiff that the track was out of repair in consequence of the defendant's neglect to remove decayed and unsound ties, and supply them with sound ones; that it was the duty of the defendant to take due care to see that the ties in use are not permitted to decay to such extent as to endanger the safety of its passengers, and omission of this duty is a negligent failure to keep the road in proper repair; and that it is for you to say, in the light of the evidence, whether or not the defendant was guilty of negligence in regard to the ties at the accident in question.[101]

Accident resulting from sudden thaw.

(600) The defendant company would not be liable in this

[100] Approved in Bedford, S., O. & B. R. Co. v. Rainbolt, 99 Ind 551.

[101] Approved in Andrews v. Chicago, M. & St. P. Ry. Co., 86 Iowa, 677.

case and you will find for the defendant if the proof shows that the accident was directly caused by an unprecedented spell of bad weather, as sudden freezes and thaws, and that this spell of weather could not have been guarded against by human foresight, skill and judgment. If, however, the road had been out of repair before the bad weather set in, and proper judgment was not used beforehand to put the roadbed in good condition, and the injury resulted from a bad condition of the road and imperfect and bad track and road, and the same could have been avoided by proper skill and judgment, then the company cannot defeat a recovery by proof that the accident was caused by an unprecedented spell of bad weather.[102]

Broken rail caused by extreme cold.

(601) The court instructs the jury that if they believe from the evidence that the defendant's train of cars in which plaintiff was being carried as a passenger on the morning of the ——— day of ———, 19—, was thrown from the track, causing the injury to plaintiff in petition complained of, wholly because of a fresh and contemporaneous break in an iron rail or piece of an iron rail of defendant's track, and under the train on which plaintiff was a passenger, and that such fresh break was caused wholly by frost or extreme cold, and that such cause was one which the highest degree of practicable care, skill, and caution, consistent with operating the road at all could not have provided against, and that said train was not thrown from the track because of the mode of construction and repair of said track, and not because of any fault or neglect whatever of defendant, its agents or servants, then the jury should find for defendant as to the injuries to the person of plaintiff in petition complained of. But if the jury believe from the evidence that frost or extreme cold was not the sole cause of the breaking of said rail, but only

[102] Approved in Missouri Pac. Ry. Co. v. Johnson, 72 Tex. 95.

contributed thereto, and the railroad track where said rail broke was in an unsafe and dangerous condition, that might have been remedied or guarded against by the exercise by defendant's employees of the highest degree of care and skill then practicable and then known to track repairers, and that such unsafe and dangerous condition of said railroad track of defendant at said point also contributed to cause the breaking of said rail jointly with the said frost and extreme cold, then the law is for the plaintiff and he is entitled to compensatory damages.[103]

Duty to provide seats.

(602) The court instructs the jury that it is the duty of a railroad company towards passengers upon their passenger trains to exercise that high degree of care and prudence that would be used by very cautious, prudent, and competent persons, under like circumstances, in order to the safe transport of the passenger to his destination, and it is the duty of the company to use that degree of care in furnishing a sufficient number of cars in order that a passenger may procure a seat in the cars.[104]

Duty to provide seat in particular part of car.

(603) The court instructs the jury that it was not the duty of defendant company to provide plaintiff with a seat in the forward or any particular part of its car.[105]

F. SETTING DOWN PASSENGERS.

Notice of arrival at station.

(604) The court instructs the jury that it is the duty of the defendant to give plaintiff reasonably sufficient notice of the approach and arrival of the train at ———, and to

[103] Approved in Louisville & N. R. Co. v. Fox, 74 Ky. (11 Bush) 495.

[104] Approved in International & G. N. R. Co. v. Williams, 20 Tex. Civ. App. 587.

[105] Dougherty v. Missouri R. Co., 97 Mo. 647.

afford him a reasonable opportunity to get off the train. That upon the arrival of said train at ———, it was the duty of the plaintiff to alight from the train at said station. If therefore, you find from the evidence, that the employees of defendant in charge of said train gave notice of the approach and arrival of said train at ——— in the usual manner, and that the notice of such approach was given in a manner reasonably calculated to inform plaintiff of the arrival of said train at said station, and if you further believe from the evidence that said train remained at said station a sufficient length of time to enable plaintiff to alight therefrom, and that he failed to do so, then the plaintiff would not be entitled to recover, and you should find a verdict for the defendant.[106]

Duty of passenger to be in readiness to alight.

(605) Railway passengers are required to take notice of the usual regulations. Where it is the custom to signal the approach to a station by the blowing of a whistle, and to announce the name of a station in the cars for the purpose of giving notice and opportunity to passengers to be in readiness to depart without delay when the train stops and when these regulations are observed, it is the duty of the passengers to make themselves ready to get off at once, and if there is any reason why they need assistance, or require more than the usual time, they should notify the officers and servants on the train.[107]

General liability.

(606) The court instructs the jury that if the plaintiff in this case was accepted as a passenger on the defendant's road, and paid his fare, and in reaching the station of his destination, and upon attempting to get off the train he was thrown down and injured, and this was caused by the neg-

[106] Approved in St. Louis S. W. Ry. Co. v. Ricketts, 22 Tex. Civ. App. 515.

[107] Little Rock & Ft. S. R. Co. v. Atkins, 46 Ark. 423.

ligence or the failure of duty upon the part of the defendant, its agents or servants, he is then entitled to recover, unless by his own negligence or want of care he so far contributed to the accident as to deprive him of any remedy.[108]

General duty—Instruction framed for defendant.

(607) The court instructs the jury that if they believe from the evidence that plaintiff was a passenger on the train of defendant from ——— to ———, and that defendant in transporting plaintiff used due and proper care for her safety and gave her reasonable time at ——— to alight from defendant's train, and that the injury complained of by plaintiff was not occasioned by the negligence of defendant, its servants or employees, they will find for defendant.[109]

Degree of care required to protect passenger while alighting.

(608) The court instructs the jury that if you believe from the evidence that defendant's employees in charge of said train exercised that high degree of care for the personal safety of plaintiff in alighting from said train which very cautious and prudent persons would have exercised under the same circumstances, then you will find that they were not guilty of negligence and if you so find, you will return a verdict in favor of defendant.[110]

(609) If the jury believe from the evidence that the injury to the plaintiff would have been prevented if the defendant or its employees had used reasonable care and caution in the place and manner in which the plaintiff was put off the train, and that it did not use such care and caution, under all the circumstances of the case, they will find for the plaintiff the full amount of her injury and damage that may be shown by the evidence.[111]

[108] Approved in Houston & T. C. R. Co. v. Gorbett, 49 Tex. 573.

[109] Approved in Georgia Pac. R. Co. v. West, 66 Miss. 310.

[110] Approved in Missouri, K. & T. Ry. Co. of Texas v. White, 22 Tex. Civ. App. 424.

[111] Approved in Georgia Pac. R. Co. v. West, 66 Miss. 310.

Drawing up to the platform.

(610) The defendant was bound to stop its cars at such part of the platform at B. as would make it safe for the plaintiff to get off, and to exercise reasonable care and caution in providing for the safety of its passengers in getting off, and if the jury believe that the accident befell the plaintiff because of the defendant having her alight too near to the end of the platform to be safe, and that she was caused to fall in trying to get from the car to the platform, and not from negligence on her part, the jury will find for plaintiff her full injury and damages that may be shown by the evidence.[112]

Starting after temporary stop—Right of passenger to assume that first stop is at platform.

(611) The court instructs the jury that the plaintiff had a right, after the name of the station was announced, to infer that the first stop of the train at the platform was at the station, and when the train came to a full stop, if the jury believe it did come to a full stop, opposite the platform of the station, and the conductor had stepped off his train with his lantern immediately preceding said stopping, if any, the plaintiff was warranted in believing the proper time had arrived for him to leave the train, unless the jury believe he was warned or directed not to alight then; and if the jury believe from the evidence that said train came to a full stop opposite the platform of this station, and the plaintiff, in the exercise of such care as a prudent person would have used, undertook to leave the train, and through the sudden starting of the same was jerked or thrown therefrom, or fell upon the platform, and between it and the cars, and was injured as charged in the petition, your finding and verdict must be for the plaintiff.[113]

(612) Railway companies are not insurers of the safety

[112] Approved in Georgia Pac. R. Co. v. West, 66 Miss. 310.

[113] Approved in Leslie v. Wabash, St. L. & P. R. Co., 88 Mo. 50.

of their passengers. They are only liable when there has been actual negligence of themselves or their servants. The running of a railway train beyond the usual stopping place at the station before coming to a standstill is not of itself negligence, or not negligence as a matter of law; nor is the pause after it is brought to a stop, for a period necessary to reverse the motion so as to back it to the usual stopping place, negligence, unless the stop is so made and for such a length of time as to indicate that it is an invitation to passengers to alight, and the movement backward is made without warning while they are alighting in response to such invitation.[114]

Duty to sufficiently light platform.

(613) The court instructs the jury that it is the duty of a railroad company, at each station where passengers get on and off the train at night, to have the passway into and out of the cars so arranged and lighted as to enable passengers getting on and off, and using reasonable care and diligence, to do so with safety.[115]

Necessity of bringing train to complete stop.

(614) The court instructs the jury that the train must be brought to a complete halt the length of time necessary, and not merely checked up in its speed.[116]

Duty to afford time to alight.

(615) The court instructs the jury that it was the duty of defendant's employees to stop the train a sufficient and reasonable length of time to allow the plaintiff to get off the train, and whether or not the train did stop such a length of time, you must decide from all the facts in evidence before you.[117]

[114] Approved in Sherwood v. Chicago & W. M. R. Co., 82 Mich. 374.

[115] Approved in Houston & T. C. R. Co. v. Gorbett, 49 Tex. 573.

[116] Approved in Houston & T. C. R. Co. v. Gorbett, 49 Tex. 573.

[117] Approved in Gulf, C. & S. F. Ry. Co. v. Rowland, 90 Tex. 365.

(616) The court instructs the jury that a passenger is entitled to a reasonable time to leave the car in which he has been riding. When a train is stopped for that purpose, and when reasonable time is not in fact allowed to get off in safety (of which the jury is the judge), and in attempting to do so, without fault on his part, injuries result to him, he is entitled to recover from the railroad company for such injuries.[118]

Definition of reasonable time to alight.

(617) The court instructs the jury that a reasonable time to get off as mentioned in these instructions is such time as it usually requires for passengers to get off and on the train at that station in safety.[119]

Additional duty imposed by infirmity of passenger.

(618) If the defendant or its officers knew of any inability of the plaintiff to alight in the usual time, it was bound to give to her such reasonable time to get off and be clear of danger in getting off as the circumstances required, and if they find from the evidence, that such were the facts, and that it did not afford plaintiff a reasonable time to alight as aforesaid, the jury will find in her favor for all the injury and damage suffered by her that may be shown by the evidence in the case.[120]

Duty to assist feeble passenger.

(619) The court instructs the jury that the defendant was under no obligation or duty to the plaintiff on account of her age or feeble condition, to assist her off the train, or to stop longer at the station than was usual, to enable her to get off,

[118] Approved in Little Rock & Ft. S. R. Co. v. Atkins, 46 Ark. 423.

[119] Approved in Little Rock & Ft. S. R. Co. v. Atkins, 46 Ark. 423.

[120] Approved in Georgia Pac. R. Co. v. West, 66 Miss. 310.

unless she had notified the conductor or some employee on the train of her condition.[121]

Duty of passenger to hasten to alight.

(620) The court instructs the jury that it was the duty of defendant's servants and employees, on the occasion in question, to stop the train long enough for plaintiff, by the exercise of ordinary care and diligence, considering her age, sex, and physical condition, to get off the train safely before it was started, or suffered to start; and if the jury believe, from the evidence, that the plaintiff, as soon as the train stopped, got up from her seat and walked at once, and as fast as she reasonably could, out on the platform and down the step on the car, without stopping on the way, that she did all the law required of her, so far as diligence on her part in getting off the train was concerned; and if, under such circumstances, the defendant's servants or employees started the train while she was proceeding to alight, still using due and reasonable haste in getting off the train, such starting of said train was an act of negligence on the part of defendant, and a breach of its duty to plaintiff as a passenger on its road.[122]

Starting train while passengers are in act of alighting.

(621) If the jury believe from the evidence that the plaintiff was not afforded a reasonable time to alight on defendant's platform by the defendant or its employees, and before she had time to reach the platform safely, the train was negligently started, and thereby caused the plaintiff to fall off said platform, and by reason of said fall she has received injury, they will find for the plaintiff to the amount of the damages as may appear from the evidence to have been sustained by her.[123]

(622) The court instructs the jury that if they believe

[121] Little Rock & Ft. S. R. Co. v. Atkins, 46 Ark. 423.

[122] Approved in Hickman v. Missouri Pac. R. Co., 91 Mo. 433.

[123] Approved in Georgia Pac. R. Co. v. West, 66 Miss. 310.

from the evidence that the defendant company, through their agents, employees and servants whilst the train of said company was at the depot, in the act of discharging passengers, negligently and violently started its train from a standstill, without notice or warning to its passengers, the said company is responsible for all injury resulting to a passenger from their act.[124]

Use of unsafe box or device to assist in alighting.

(623) The court instructs the jury that if they believe from the evidence that the box upon which plaintiff stepped or attempted to step in alighting from defendant's train was an unsafe device to be used for so alighting, by reason of its size or position or the character of the ground upon which it rested, and if they further believe that by reason of said box being unsafe for use as such device, the plaintiff in descending from the steps of defendant's car fell and was injured, and if they further believe from the evidence that the defendant's servants were guilty of negligence in failing to furnish plaintiff a safe means for alighting from said train, or if they believe that defendant's servants upon said train were guilty of negligence in failing to furnish plaintiff personal assistance necessary to prevent her from falling, and if they further believe from the evidence that such negligence, if any, of defendant's servants was the proximate cause of plaintiff's injuries, if any, then they will find for the plaintiff against the defendant such sum of money as damages as they believe from the evidence will reasonably and fairly compensate plaintiff for the bodily and mental pain, if any, reasonably necessary medical expenses, if any, loss of time from her business, if any, and diminished capacity to pursue her occupation in the future, if any, which they believe from the evidence the plaintiff has sustained or incurred by reason of said injuries, if any.[125]

[124] Approved in Southern Ry. Co. v. Smith, 95 Va. 187.

[125] Approved in Missouri, K. & T. Ry. Co. of Texas v. White, 22 Tex. Civ. App. 424.

Effect of startling passenger.

(624) The court instructs the jury that if they believe from the evidence that after plaintiff had safely gotten on the platform at B., the train started, and that, owing to her age, debility, or other cause, she was startled by the starting thereof, and in consequence made a false step and fell from the platform and was injured, the defendant was not responsible therefor, and they will find for the defendant.[126]

Liability for acts of brakeman in attempting to assist passengers to alight.

(625) The court instructs the jury that a railroad company is not responsible for the willful trespass or unlawful acts of its agents, or for acts done clearly outside of the scope of their employment; but where a brakeman on a train undertakes to direct and assist passengers in getting on and off the cars, in the absence of proof to show that this was outside of the scope of his duties, there would be no presumption that such was the fact.[127]

Injuries received after alighting.

(626) The court instructs the jury that if they believe from the evidence that plaintiff got off of defendant's train at B. and was safely delivered on the platform at said station, where passengers on the road of defendant were accustomed to alight, and in turning round she stepped off the end of said platform, that an injury received from such a fall is without fault on the part of defendant, and they will find for defendant.[128]

(627) The court instructs the jury that if they believe from the evidence that the injury complained of by plaintiff in this action was caused by a fall from the platform at B.

[126] Approved in Georgia Pac. R. Co. v. West, 66 Miss. 310.
[127] Approved in Houston & T. C. R. Co. v. Gorbett, 49 Tex. 573.
[128] Approved in Georgia Pac. R. Co. v. West, 66 Miss. 310.

to the ground, and not by reason of a fall in getting from the car on said platform, they will find for defendant.[129]

Instruction submitting issue of contributory negligence.

(628) The court instructs the jury that if from the evidence you find that plaintiff was traveling on defendant's train at or about the time alleged, and in an attempt to get off of said train at ——— was injured, and that said injury was caused by the negligence of defendant's servants and agents in negligently, carelessly, and suddenly moving their said train without having stopped a sufficient length of time to enable plaintiff to get off with safety, then you will find for plaintiff and assess his damages as hereinafter instructed, unless you find from the evidence plaintiff's own negligence contributed to the injury; and it devolves upon defendant to prove contributory negligence. If on the other hand, from the evidence, you do not believe that plaintiff was injured at the time and place alleged, or if you believe from the evidence that if he was injured, that the injury was caused by his own negligence, or of both plaintiff and defendant's servants together, then you will find for defendant and say so by your verdict.[130]

G. CONTRIBUTORY NEGLIGENCE OF PASSENGER.

Definition of contributory negligence.

(629) The court instructs the jury that negligence consists in a want of the reasonable care which would be exercised by a person of ordinary prudence, under all existing circumstances, in view of the probable danger of injury.[131]

(630) The court instructs the jury that if the plaintiffs, in taking the train in question, acted as persons of common sense and ordinary prudence and intelligence usually act in

[129] Approved in Georgia Pac. R. Co. v. West, 66 Miss. 310.

[130] Approved in Gulf, C. & S. F. Ry. Co. v. Rowland, 90 Tex. 365.

[131] Approved in Little Rock & Ft. S. R. Co. v. Atkins, 46 Ark. 423.

like cases, then there was no such negligence on their part as would prevent a recovery by them in this action.[132]

Doctrine of comparative negligence.

(631) The court instructs the jury that notwithstanding the jury shall believe from the evidence that the defendant was guilty of negligence, yet if they shall further believe from the evidence that the plaintiff was also guilty of negligence and that the accident was directly caused partly by the defendant's negligence and partly by the plaintiff's negligence, then the verdict of the jury must be for the defendant, without regard to whose negligence was the greater.[133]

(632) The court instructs the jury that if they believe, from the evidence, that the injury to the plaintiff, complained of in this action, was the result of the negligence or want of care of both the plaintiff and the defendants, the jury should find for the defendants.[134]

(633) The court instructs the jury that the fault or negligence on the part of the plaintiff which will preclude him from a recovery, if there was negligence both upon his part and upon the part of the defendant, its agents or employees, is not the least degree of fault or negligence; but it must be of such a degree as to amount to the want of ordinary or reasonable care on his part, under the circumstances, at the time of the injury.[135]

(634) The court instructs the jury that if they believe from the evidence, that the plaintiff, while on defendant's cars, imprudently and carelessly exposed himself to danger, by scuffling or playing, and that the injury to him was the result of such carelessness or imprudence, or that such carelessness or imprudence in any way contributed to produce the in-

[132] Approved in Curtis v. Detroit & M. R. Co., 27 Wis. 158.

[133] Approved in Philadelphia, W. & B. R. Co. v. Anderson, 72 Md. 519.

[134] Galena & C. U. R. Co. v. Fay, 16 Ill. 558.

[135] Approved in Houston & T. C. R. Co. v. Gorbett, 49 Tex. 573.

jury, then the plaintiff cannot recover, even though the jury may believe that the defendants have also been guilty of negligence.[136]

(635) The court instructs the jury that in this case the defendant is responsible to the plaintiff for any injury he may have received, if its negligence, or the negligence of its agents or servants, was the primary and proximate cause of the injury, although there may have been negligence also on the part of the plaintiff, unless it appears that under the circumstances he could, by the exercise of ordinary care, have avoided the consequences of the negligence of the defendant, or its agents.[137]

Liability of carrier to use ordinary care to avoid consequences of plaintiff's negligence.

(636) The court instructs the jury that if the defendant or its agent could by ordinary care have avoided the consequences of the plaintiff's negligence or want of caution, or by the direct act of its agent caused the act which produced the injury, he would then be entitled to recover.[138]

Degree of care required of passenger.

(637) The court instructs the jury that the degree of care required of a passenger is not the highest degree of care, but only the ordinary care which ordinary prudent people are accustomed to exercise.[139]

(638) The court instructs the jury that, negligence of passenger means the absence of that high degree of care to avoid injury to his or her person while traveling on a train or alighting therefrom which very cautious and prudent persons usually exercise under the same or similar circumstances.[140]

[136] Galena & C. U. R. Co. v. Fay, 16 Ill. 558.

[137] Approved in Houston & T. C. R. Co. v. Gorbett, 49 Tex. 573.

[138] Approved in Houston & T. C. R. Co. v. Gorbett, 49 Tex. 573.

[139] Approved in Philadelphia, W. & B. R. Co. v. Anderson, 72 Md. 519.

[140] Approved in Houston & T. C. R. Co. v. Dotson, 15 Tex. Civ. App. 73.

Duty of passenger to exercise ordinary care.

(639) The court instructs the jury that the plaintiff cannot recover, notwithstanding there may have been negligence on the part of the defendant or its agents which have contributed to the accident, if he, by the want of ordinary care, and by his own voluntary acts, so far himself contributed to the accident that but for this fact it would not have happened.[141]

Definition of ordinary care.

(640) The court instructs the jury that the term "ordinary care" as used in these instructions means such care as would ordinarily be used by prudent persons in the performance of like service under the same circumstances.[142]

(641) The court instructs the jury that by ordinary care, is meant that degree of care which may be reasonably expected of a person in the situation of the plaintiff at the time the injury was received.[143]

(642) The court instructs the jury that, if you believe from the evidence that the plaintiff in alighting from the train, failed to exercise the ordinary care and caution which a prudent man would usually exercise under like circumstances, and that such neglect on the part of the plaintiff, contributed proximately to the injury suffered by him, then the plaintiff is guilty of contributory negligence and he cannot recover in this suit.[144]

Risks assumed by passenger.

(643) The plaintiff, as passenger upon defendants' railroad, must be presumed to have taken upon himself the risks necessarily incident to the mode of travel which he adopted, and if, without fault of the defendants, or by a concurrence of the fault, negligence or want of care of both plaintiff and

141 Approved in Houston & T. C. R. Co. v. Gorbett, 49 Tex. 573.
142 Approved in Mirrieles v. Wabash Ry. Co., 163 Mo. 470.
143 Approved in Houston & T. C. R. Co. v. Gorbett, 49 Tex. 573.
144 Approved in International & G. N. R. Co. v. Eckford, 71 Tex. 274.

defendants, the plaintiff was injured, the jury should find for the defendants.[145]

Attributed negligence of plaintiff's husband.

(644) The court instructs the jury that before the plaintiffs can recover in this action, it must appear that defendant was guilty of some act of negligence which directly contributed to the accident. It must also appear that plaintiff was without the least fault or negligence on her part which in any wise contributed to the accident; and it is the same whether what she did was of her own volition or by the advice or guidance of her husband.[146]

Instructions of carriers' servants justifying acts of passenger.

(645) The court instructs the jury that a passenger is warranted in obeying the directions of the servants and agents of the carrier, when given within the scope of their duty, unless such obedience leads to a known peril which a prudent person would not encounter.[147]

Matters which may be considered in determining question of negligence.

(646) The court instructs the jury that in considering the question of negligence, it is competent for the jury, in connection with the other facts and circumstances of the case, to infer the absence of fault on the part of the deceased, from the general and known disposition of men to take care of themselves, and to keep out of the way of difficulty and danger.[148]

Use of intoxicating liquors.

(647) The court instructs the jury that if they find from the evidence, that the deceased, on the night of ———, and

[145] Galena & C. U. R. Co. v. Fay, 16 Ill. 558.

[146] Approved in Curtis v. Detroit & M. R. Co., 27 Wis. 158.

[147] Approved in Louisville, N. A. & C. R. Co. v. Wood, 133 Ind. 544.

[148] Approved in Baltimore & O. R. Co. v. State to use of Hauer, 60 Md. 449.

the morning of ———, had used intoxicating drink, as testified to by conductor P., and witnesses Y. and H., but shall further find, that he was not drunk when he crossed the defendant's track at W., such use of intoxicating drink, is not evidence from which the jury may infer the want of ordinary care and prudence on his part.[149]

(648) The court instructs the jury that intoxication on the part of the plaintiff, if the jury believe that the plaintiff was intoxicated, is not, as a general rule, in itself, as a matter of law, such negligence or evidence of such negligence as will bar his recovery in this action. The law refuses to impute negligence as of course to a plaintiff from the bare fact that at the moment of suffering the injury he was intoxicated. Intoxication is one thing and negligence sufficient to bar an action for damages quite another thing. Intoxicated persons are not removed from all protection of law. If the plaintiff used that degree of care incumbent upon him to use, under the circumstances of this case, as explained to you in a previous instruction, then his intoxication, if you believe from the evidence he was intoxicated, had nothing to do with the accident. When contributory negligence is one of the issues, as in this case, it must appear that the plaintiff did not exercise ordinary care, and that, too, without reference to his inebriety. The question is whether or not the plaintiff's conduct came up to the standard of ordinary care—not whether or not the plaintiff was drunk.[150]

Standing on platform.

(649) The court instructs the jury that the fact that a passenger at the time of sustaining the injury for which he sues was standing on the platform of a moving coach does not *per se* show negligence of the passenger in taking such a position, but all the circumstances of the case are to go to the jury

[149] Approved in Baltimore & O. R. Co. v. State to use of Hauer, 60 Md. 449.

[150] Approved in Denver Tramway Co. v. Reid, 4 Colo. App. 53.

and it is for them to determine whether the carrier is liable in damages.[151]

(650) The court instructs the jury that a passenger upon a railroad train, after said train has stopped at a regular station, has a right to go upon the platform of said coach in which said passenger may be, and within the time allowed by the rules of the company for the stopping of said train at said station, so that said passenger being upon said platform does not interfere with the proper management of said train, or with passengers alighting therefrom or getting thereon, and that it is not *per se* negligence so to do, and that the mere fact of a passenger being upon the platform under such circumstances does not constitute negligence upon the part of said passenger.[152]

(651) The court instructs the jury that if they believe from the evidence that the defendant, by its servants in charge of its car, on the ——— day of ———, received the plaintiff as a passenger and that plaintiff rode upon the rear platform of the car, and that plaintiff was carried as a passenger on such rear platform and plaintiff paid his fare to the defendant's conductor in the charge of the car and if the jury believe from the evidence that plaintiff was riding as such passenger upon the said platform at the time of the collision in which plaintiff alleges he was injured, then the jury are instructed that the question as to whether such riding upon the platform was negligence on the part of the plaintiff is one of fact for the jury to decide.[153]

Riding on platform on account of lack of accommodations inside.

(652) The court instructs the jury that if they believe from the evidence that under the circumstances of the case there was a reasonable necessity, either real or apparent, for

[151] Doolittle v. Southern Ry., 62 S. C. 130

[152] Approved in Southern Ry. Co. v. Smith, 95 Va. 187.

[153] St. Louis, B. & S. Co. v. Hopkins, 100 Ill. App. 567.

the plaintiff to travel on the platform of the car, and that he made such effort to obtain accommodations inside of the car as an ordinarily prudent man would have made under similar circumstances, then he was not guilty of negligence by reason of standing or traveling on the platform.[154]

Passing from one car to another.

(653) The court instructs the jury that if they believe from the evidence that while the train was in motion, the said plaintiff, for his own convenience, left the inside of the car in which he had been riding, and went upon the platform for the purpose of riding there, or of passing into the next car in search of a seat, they are instructed that the plaintiff assumed all risk of falling or being thrown from the said train by reason of the motion or oscillation thereof whether caused by speed, curves, frogs, or switches, and they must find for the defendant.[155]

(654) The court instructs the jury that if they believe from the evidence, that previous to taking passage upon the cars of the defendant at the depot in ——— the plaintiff was directed by the conductor to take his place in the baggage car because there was no room for him in the first-class passenger car, and that the plaintiff went into the said baggage car in pursuance to the direction of the conductor, and while on the way from ——— to ——— he left the baggage car without any reasonable cause, and passed carelessly from one car to another, and if the jury believe from the evidence that the injury to the plaintiff happened in consequence of his so leaving the car and so passing carelessly from one car to another, then the plaintiff cannot recover.[156]

(655) The jury are instructed that if they believe from the evidence that the plaintiff, after getting on the car he first

[154] Approved in Highland Ave. & B. R. Co. v. Donovan, 94 Ala. 299.

[155] Approved in Chesapeake & O. Ry. Co. v. Clowes, 93 Va. 189.

[156] Galena & C. U. R. Co. v. Fay, 16 Ill. 558.

entered, was unable to find a seat therein by reason of its crowded condition, that he was told by the conductor of the train that he might find a seat in the forward car; that he went forward after receiving such suggestion and attempted to pass from that car to the next one; that when he got out on the platform he did not remain there, but attempted to pass into the next car with reasonable promptness; that while so passing he exercised reasonable care and caution under the circumstances; that while so passing he was thrown from the car by reason of the defendant's train being run over the switch, and along the curve mentioned in the declaration, at a dangerous rate of speed, they must find for the plaintiff. The burden of proving these facts is upon the plaintiff. But if the jury shall believe that he did not receive any such suggestion from the conductor, or that if he received it, and in passing from one car to the other, or in loitering upon the platform, or in the selection of the time when he undertook to so cross the platform in any other particular, he did not exercise such care and caution as a reasonably prudent man under all the circumstances should have exercised for his own protection, they should find for the defendant. If the jury find for the plaintiff, they may, in assessing his damages, take into consideration his expenses in attempting to be cured, his loss from being kept from transacting his business, his pain and suffering up to the present time, and also any pain or distress he may suffer by reason of his impaired hearing.[157]

(656) The court instructs the jury that if they believe from the evidence, that the plaintiff, while on his passage from ——— to ——— was guilty of carelessness, and unnecessarily exposing himself to danger by wrestling or scuffling on the cars, or by imprudently and unnecessarily passing from one car to another while the cars were in motion, and that such carelessness or imprudence contributed in any way to produce the injury, then the plaintiff cannot recover.[158]

[157] Approved in Chesapeake & O. Ry. Co. v. Clowes, 93 Va. 189.
[158] Galena & C. U. R. Co. v. Fay, 16 Ill. 558.

Statutory provision requiring that contributory negligence must be criminal.

(657) By section 3, article 1 of chapter 72 of our Compiled Laws, it is provided as follows: "Every railroad company as aforesaid shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in case where the injury done arises from the criminal negligence of the persons injured, or when the injury complained of shall be the violation of some express rule or regulation of the said road actually brought to his or her notice."

The term "criminal negligence," as it is used in the statute above quoted, is defined to be gross negligence. It is such negligence as would amount to a flagrant and reckless disregard of her own safety and amount to a willful indifference to the injury liable to follow.

Should you find from the testimony that the train on which the plaintiff was riding did not stop at the ——— station a sufficient time to permit plaintiff to alight therefrom, and that she afterwards attempted to step or leap therefrom while said train was in motion, you should next determine whether she was, in trying to alight while the train was in motion, guilty of such gross or criminal negligence as is defined in the last paragraph.

Should you, however, find that the plaintiff had a reasonable and sufficient time to alight from said train and reach the depot platform in safety while said train was at rest, then the defendant would not be liable in the action, and you should so find.

Should you find that plaintiff did not have a sufficient time to alight from the said train as above explained, but that she was guilty of gross or criminal negligence in alighting while the train was in motion, you will find for the defendant.[159]

[159] Approved in Omaha & R. V. Ry. Co. v. Chollette, 33 Neb. 143.

Criminal negligence where sufficient time to alight is not afforded.

(658) If, from the evidence in this case, you find that the defendant's train did not stop at the station at E. long enough to enable the plaintiff to leave the car in which she was riding, and reach the platform while the train was standing and before it was again started, and that she was thrown or precipitated therefrom, or that she stepped therefrom onto the depot platform after the train was started and was in motion, it is for you to say, upon consideration of all the evidence upon that question, whether she was guilty of criminal negligence as elsewhere defined in these instructions.[160]

(659) You are instructed that a passenger upon a railroad train, is entitled to a reasonable time to leave or alight from the car in which he is riding, when a train is stopped for that purpose, and when reasonable time is not in fact given in which to alight in safety, if, in attempting to do so, injuries result to him, he is entitled to recover from the railroad company for such injuries, unless in doing so he is guilty of criminal negligence, as elsewhere defined in these instructions, or unless in doing so, he is violating some express rule or regulation of said railroad actually brought to his notice.[161]

Under statute requiring that act when not criminally negligent must be in violation of a known rule of the company.

(660) The court instructs the jury that should you find that defendant's train did not stop at ——— station long enough to enable the plaintiff to alight from the car in which she was riding, and that she was not guilty of such gross or criminal negligence as here defined in attempting to alight while the train was in motion, you should next determine from the testimony whether or not the plaintiff, at the immediate time of the injury in question, was guilty of violating

[160] Approved in Omaha & R. V. Ry. Co. v. Chollette, 33 Neb. 143.
[161] Approved in Omaha & R. V. Ry. Co. v. Chollette, 33 Neb. 143.

any express rule or regulation of defendant company for the safety of passengers upon its train, and whether she had actual notice of such rule or regulation.[162]

(661) The court instructs the jury that if you find that at and prior to the time in question there existed an express rule or regulation of the defendant company that passengers should not stand upon the platform of the cars while the train was in motion, and that such rule or regulation was actually before that time brought to plaintiff's knowledge by means of notices posted upon the doors of defendant's cars, and if she went upon the platform of the moving train in violation of such express rule or regulation and attempted to step therefrom to the depot platform, she could not recover in this case; but if she was in the act of leaving the train at the time the train started then the standing upon such platform would not be violation of such rule or regulation, although the train may have been in motion.[163]

Mail agent projecting head from car.

(662) If you believe, from the evidence, that it was necessary for ———, in the discharge of his duty, to project his head from the car at ——— station, but that he put his head out before it was actually necessary, on account of the distance of the train from the passenger platform, this would not prevent the plaintiff from recovering if otherwise entitled, if you believe that the acts of defendant's servants in charge of the train were such as would reasonably induce the said ———, situated as he was, to believe that he was at the usual place for ejecting his head in performance of his duty.[164]

Allowing arm to project from car window.

(663) The court instructs the jury that if they find that plaintiff was injured as charged in the petition, while being

[162] Approved in Omaha & R. V. Ry. Co. v. Chollette, 33 Neb. 143.
[163] Omaha & R. V. Ry. Co. v. Chollette, 33 Neb. 143.
[164] Houston & T. C. Ry. Co. v. Hampton, 64 Tex. 427.

transported as a passenger in defendant's car from the city of ——— to the town of ———, and that it was caused by the carelessness of defendant's agents and servants in running, conducting and managing said car or the train to which it was attached without any fault, misconduct or negligence on the part of plaintiff immediately contributing thereto, then they must find for the plaintiff.

Although plaintiff may have failed to exercise ordinary care and prudence while a passenger on defendant's car which may have contributed remotely to the injury complained of, yet, if the employees of defendant were guilty of negligence which was the direct and immediate cause of the injury and might have prevented it by the exercise of prudence and care, the defendant is liable.

That although the plaintiff was injured by having his arm broken, yet if at the time of said injury, plaintiff by negligence or carelessness had his arm out of the window of said car, and that such negligence or carelessness contributed directly to the happening of such injury, the verdict should be for the defendant.[165]

(664) The court instructs the jury that if you believe that plaintiff was injured while a passenger on defendant's car, and that he failed to use ordinary care and prudence while a passenger on said car, in having his arm protruding outside the car, but that such negligence was slight, and contributed only remotely to the injury complained of; and you believe that the defendant's agents or employees left a car on the switch near the main track of said defendant where the train on which the plaintiff was, had to pass, and that said car or some object thereon came in contact with plaintiff's arm and caused the injury complained of; and you believe that leaving said car in said position was an act of negligence on the part of defendant which was the direct and immediate cause of the injury, and that the defendant might have pre-

[165] Barton v. St. Louis & I. M. R. Co., 52 Mo. 253.

vented it by the exercise of prudence and care, then defendant is liable, and you will find a verdict in favor of plaintiff for such actual damages as you believe he has sustained.[166]

Postal clerk riding in mail car.

(665) If the plaintiff was riding in the mail car composing a part of said train, and in his proper place in said car, then the fact, if such be a fact, that it was a more dangerous place in which to travel than other cars composing said train would in no way affect the right of plaintiff to recover in this cause.[167]

Passenger leaping to avoid sudden danger.

(666) The court instructs the jury that if they believe from the evidence, that by reason of the omission or neglect of the defendants or any one of their servants, the cars were thrown off the track while under way, and the plaintiff was thereby put in danger, and, to save himself, leaped from the car, and thus received the injury, the defendants cannot excuse themselves from responsibility by reason of any act of the plaintiff, unless they show first, that such act helped to produce the injury, and secondly, that such act was so imprudent, rash or heedless, that the exercise of such prudence as the average of mankind possess, would have prevented the plaintiff from doing the act.[168]

Alighting when train has not stopped at platform.

(667) The court instructs the jury that if the jury find that the defendant's cars passed the platform of the station where the plaintiff, a passenger, was to have gotten off and stopped some distance beyond said platform and the said plaintiff then and there voluntarily and without any direction or command of any of the persons in charge of said train got off the car with the assistance of the conductor and brakeman,

166 Gulf, C. & S. F. Ry. Co. v. Danshank, 6 Tex. Civ. App. 385.
167 Approved in Gulf, C. & S. F. Ry. Co. v. Wilson, 79 Tex. 371.
168 Galena & C. U. R. Co. v. Fay, 16 Ill. 558.

and was not injured in thus getting off, the plaintiffs are not entitled to recover.[169]

(668) The court instructs you that it was the duty of the plaintiff, in seeking to alight from the cars of the defendant company, to wait until such cars came to a full stop, or were moving so slowly that, under all the circumstances, including the time of night, her sex and condition, it was safe for her to step off; and if she sought to alight from the car before such time, although unless she did so she might be carried by the point where she desired to get off she was negligent and cannot recover in this case.[170]

Failure to take note of arrival at station.

(669) The court instructs the jury that it is the duty of a passenger on a railroad train to use his senses and take notice of the usual announcement of stations, and if by reason of his negligence the passenger fails to hear notice of the arrival of the train at his place of destination, and remains on the train and is carried beyond, the fault is the passenger's, and the carrier is not liable therefor; if, therefore, you believe from the evidence that defendant's servants in charge of the train gave the usual announcements of stations as the train approached ———, and if by reason of plaintiff's negligence he failed to hear such announcement, and plaintiff remained on the train and was carried beyond, the fault was the plaintiff's and the defendant is not liable therefor, and you should return a verdict in its favor.[171]

Duty of passenger to exercise reasonable diligence while alighting.

(670) It was the duty of the plaintiff to exercise reasonable diligence in alighting from the train upon its arrival at the station; and if you believe the train stopped long enough

[169] Approved in Baltimore & O. R. Co. v. Leapley, 65 Md. 571.
[170] Approved in Denver Tramway Co. v. Owens, 20 Colo. 107.
[171] Approved in St. Louis S. W. Ry. Co. of Texas v. Ricketts, 22 Tex. Civ. App. 515.

to enable her to have alighted by the exercise of reasonable diligence, you will find for the defendant.[172]

(671) The court instructs you that it was the duty of the plaintiff to use ordinary care as hereinbefore defined, as to her own protection in alighting from defendant's car, and if she was guilty of negligence contributing to the injuries of which she complains, then she cannot recover. That is to say, if the defendant, by its servants, was guilty of negligence, and the plaintiff was also guilty of negligence contributing to her injuries, then the plaintiff cannot recover in this action.[173]

Jumping from car steps to platform.

(672) The court instructs the jury that if they find from the evidence that plaintiff attempted to jump from the car steps to the station platform and received the injury in question, in consequence, then plaintiff cannot recover.[174]

Neglect of passenger to avail himself of railing.

(673) The court instructs the jury that, if the accident resulted from plaintiff's neglecting to steady herself down the platform steps by means of the railing, then plaintiff cannot recover.[175]

Passenger alighting from moving train.

(674) The court instructs the jury that if they believe from the evidence, that the plaintiff leaped from the defendants' baggage car, while said car, and the locomotive and tender were upon the track, and while the cars were moving slowly, these are facts from which the jury may presume that the plaintiff was guilty of imprudence and carelessness in leaping from said cars.[176]

(675) The court instructs the jury that if they believe

[172] Little Rock & Ft. S. R. Co. v. Atkins, 46 Ark. 423.
[173] Approved in Denver Tramway Co. v. Owens, 20 Colo. 107.
[174] Delamatyr v. Milwaukee & P. R. Co., 24 Wis. 578.
[175] Approved in Delamatyr v. Milwaukee & P. R. Co., 24 Wis. 578.
[176] Galena & C. U. R. Co. v. Fay, 16 Ill. 558.

from the evidence, that the plaintiff leaped from the cars of the defendants when he was in no peril, and leaped carelessly and recklessly, and that his careless and reckless manner of jumping contributed to produce the injury, then the plaintiff cannot recover.[177]

(676) The court instructs the jury that if they believe from the evidence, that the plaintiff leaped from the cars of the defendants, under circumstances that would not have justified such an act on the part of a prudent, careful man, and that the injury was the result of such leaping, then the plaintiff cannot recover.[178]

Matters controlling negligence in attempt to leave train in motion.

(677) The court instructs the jury that if they believe from the evidence that the plaintiff attempted to step from the platform of the coach of defendant to the platform at B., while the train of defendant was in motion, and that under the circumstances of this case, the train being in motion, the age, sex of plaintiff, and other surrounding circumstances, the attempt to get from the train was hazardous, and not one that a person of ordinary prudence under similar situation or circumstances would have made, they will find for the defendant.[179]

Consideration of youth of plaintiff in determining question of negligence.

(678) The court instructs the jury that in determining the question of whether plaintiff was guilty of negligence they may consider the fact that plaintiff was a mere youth, and may determine whether he possessed discretion to know what his conduct ought to have been and the judgment to conduct himself with the prudence that older persons would have used under the circumstances.[180]

177 Galena & C. U. R. Co. v. Fay, 16 Ill. 558.
178 Galena & C. U. R. Co. v. Fay, 16 Ill. 558.
179 Approved in Georgia Pac. R. Co. v. West, 66 Miss. 310.
180 Dixon v. Mobile & G. R. Co., 80 Ga. 212.

Stepping from moving train where carrier has failed to make sufficient stop.

(679) If the jury find from the evidence in this cause that the defendant's train did not stop at the station at K. long enough to enable the plaintiff to leave the car and reach the platform while the train was stationary, and that she stepped off therefrom on the platform while the train was in motion, it is a question for the jury to say whether she was guilty of negligence, as above defined, and barred thereby from a recovery for the injuries received.[181]

(680) The court instructs the jury that the fact, if they find it to be a fact, that the defendant's train did not stop at the station long enough to enable plaintiff to alight therefrom, would not of itself excuse plaintiff or justify her stepping from the train while in motion.[182]

(681) The court instructs the jury that if from the evidence you believe that the defendant's servants were guilty of negligence in starting the train too soon, as alleged, yet, if from the evidence you believe that plaintiff was also guilty of negligence in starting the train too soon, as alleged, yet, if and that he would not have sustained any injury, if you believe that he did sustain such injury, if he had not himself been guilty of negligence which directly contributed to the alleged injury, then you will find for the defendant, although you may believe that the train did not stop long enough for the plaintiff to get off.[183]

Passenger alighting from moving train by direction of carrier's servant.

(682) The court instructs the jury that if in this case they believe, from a fair preponderance of the evidence, that the plaintiff obeyed the defendant's conductor in charge of the

[181] Approved in Little Rock & Ft. S. R. Co. v. Atkins, 46 Ark. 423.

[182] Approved in Omaha & R. V. Ry. Co. v. Chollette, 33 Neb. 143.

[183] Approved in Gulf, C. & S. F. Ry. Co. v. Rowland, 90 Tex. 365.

train upon which she was a passenger, in getting off of the train, and if she was not then apprised of any peril that she would encounter thereby, she would not be guilty of contributing to any injuries received by her in thus alighting from the train.[184]

(683) The court instructs the jury that if they find from the evidence that the plaintiff was ordered or directed by the defendant's conductor or employees to get off the train, and told to hurry up, and such orders and directions would cause a man of ordinary reason to believe that he must leave the train, or submit to the inconvenience of being carried past the station, and that the plaintiff in getting off the train was injured, the defendant is liable; provided that they find that the act of getting off the train was a careful and prudent act, and not a rash and careless exposure to peril and hazard.[185]

(684) Before the jury can find for the plaintiff, on the ground that the agent or other employee of the defendant directed or advised the plaintiff to get off the train, they must find from the evidence that such directions or advice were given at a time and in a manner that would have induced the belief in the mind of a man of ordinary reason that such agent meant and intended that he should get off at the time and under the circumstances existing at the time he did get off.[186]

(685) If the jury find from the evidence that the plaintiff was a passenger on defendant's train for K., and, on arriving there, the conductor or agent called out the name of the station, and directed the plaintiff to get off said train without first stopping it, and that the platform at that station is unsafe, and of insufficient length for the safe landing of passengers, and that the plaintiff got off the train under the direc-

[184] Approved in Louisville, N. A. & C. R. Co. v. Wood, 133 Ind. 544.

[185] Approved in St. Louis, I. M. & S. R. Co. v. Cantrell, 37 Ark. 519.

[186] Approved in St. Louis, I. M. & S. R. Co. v. Cantrell, 37 Ark. 519.

tions of the defendant's conductor, agent or employee, and, in doing so, was injured, on account of not stopping said train in time, or on account of such unsafe or insufficient platform, the defendant is liable.[187]

(686) If the jury find from the evidence that the plaintiff was ordered or directed by the conductor or agent of the defendant to get off the train, he had a right to rely upon such advice or directions, provided he took no more risk in getting off the train than a prudent man would have taken under the same circumstances.[188]

Passenger pulled from moving train by conductor.

(687) The court instructs the jury that if the fact be that the defendant's conductor, having charge of the train upon which plaintiff was a passenger, seized hold of her while the train was in motion and was moving on, and pulled her from the platform of the coach by the exercise of physical force, and thereby caused her to strike the ground or other hard substance below, whereby she was injured, she would not be guilty of contributing to injuries received thereby.[189]

Leaving moving train to avoid being carried by station.

(688) If the jury believe from the evidence that the train of cars upon which the plaintiff had taken passage had stopped a sufficient time for the plaintiff to have left them upon the platform where passengers leaving the defendant's cars usually land, and had again started on their course, and had passed the platform provided by the defendant for passengers to get out of the cars upon, and that the plaintiff then left the platform of the car rather than be carried by, he was guilty of carelessness, and cannot recover in the action.[190]

[187] Approved in St. Louis, I. M. & S. R. Co. v. Cantrell, 37 Ark. 519.

[188] Approved in St. Louis, I. M. & S. R. Co. v. Cantrell, 37 Ark. 519.

[189] Approved in Louisville, N. A. & C. R. Co. v. Wood, 133 Ind. 544.

[190] Approved in Davis v. Chicago & N. W. Ry. Co., 18 Wis. 175.

(689) The court instructs the jury that if you find from the evidence that defendant's train stopped a sufficient length of time to enable plaintiff to leave it, and further find that plaintiff neglected to leave while so stopped, but carelessly and negligently jumped from it after it was put in motion, and that by reason of so leaving the train, the injury (if any) was caused, then he would not be entitled to recover.[191]

Burden of proof of contributory negligence.

(690) The court instructs the jury that although the burden of proving that the plaintiff contributed to the injury complained of is upon the defendant, yet if the jury shall believe from all the evidence in the case, whether such evidence was offered by plaintiff or defendant, that there is a preponderance of testimony that the plaintiff was guilty of any negligence which contributed directly to producing the injury complained of, then the burden of proof is satisfied and the verdict of the jury must be for the defendant.[192]

(691) The court instructs the jury that the presumption is that the plaintiff used ordinary care and prudence at the time of the alleged injury, and it is incumbent upon the defendant to prove that the plaintiff did not use such ordinary care and prudence, and to prove that the want of such ordinary care and diligence on the part of the plaintiff was the immediate and not the remote cause of the injury complained of.[193]

Burden of establishing freedom from contributory negligence.

(692) The court instructs the jury that the law requires of a passenger on a railroad, the exercise of ordinary care and caution by him, to avoid injury from the accidents to which that mode of travel exposes him, and before he can recover damages against the railroad company for an injury received

[191] Approved in Gulf, C. & S. F. Ry. Co. v. Rowland, 90 Tex. 365.

[192] Approved in Philadelphia, W. & B. R. Co. v. Anderson, 72 Md. 519.

[193] Approved in Denver Tramway Co. v. Reid, 4 Colo. App. 53.

by him, while so traveling, he must show, by evidence, not only negligence or improper conduct on the part of the company or its agents or employees, but also that he himself was guilty of no want of ordinary care to avoid the injury from such negligence or improper conduct.[194]

H. EVIDENCE AND BURDEN OF PROOF IN ACTIONS FOR INJURY TO PASSENGER.

Where burden lies in general.

(693) The burden of proof is on the plaintiff to establish by a preponderance of the evidence the facts necessary to a verdict in his favor under these instructions, except upon the issue concerning the exercise of ordinary care by plaintiff. As to that issue the burden of proof is on the defendant to show the want of such ordinary care on the plaintiff's part.[195]

Burden of proof of negligence.

(694) The court instructs the jury that, in order for the plaintiff to recover, he must show that the personal injury received was the result of some act of negligence on the part of the railway company, or its servants. The mere fact of an injury is not enough without proof of negligence on the part of the defendant, and the burden of proof to establish such negligence is upon the plaintiff. But the jury should consider the whole evidence in the case on both sides in reaching a conclusion as to the fact of negligence.[196]

Presumption of negligence from happening of injury.

(695) The court instructs the jury that where a passenger is injured on a railroad while traveling thereon as a passenger through some agency or instrumentality of the railroad, there is, from that fact alone, *prima facie* evidence of neglect in the management of the road, which evidence defendants are

[194] Illinois Cent. R. Co. v. Simmons, 38 Ill. 242.

[195] Approved in O'Connell v. St. Louis Cable & W. R. Co., 106 Mo. 482.

[196] Reynolds v. Richmond & M. Ry. Co., 92 Va. 400.

bound to rebut or they will be held liable in damages for the injury. The presumption is not conclusive and the jury must determine the negligence of the company from all the facts and circumstances of the case.[197]

(696) The court instructs the jury that it is not sufficient in this case for plaintiff to prove the injuries alone, but it devolves upon her to show negligence on the part of the defendant, and that unless they believe from the evidence that defendant, its servants or employees, were negligent in delivering plaintiff at ———, they will find for defendant.[198]

(697) The burden of proof is upon the plaintiffs to show negligence on the part of the defendant. If they fail to show any facts which in law would be deemed negligence, then the plaintiffs cannot recover, and the fact or circumstance relied on must have contributed to the injury complained of; and in this connection the jury will also understand that they must be convinced from the evidence that the plaintiffs were guilty of no fault or negligence on their part.[199]

(698) The court instructs the jury that if they believe from the evidence that the plaintiff was a passenger on one of defendant's cars, and while exercising reasonable care and diligence with respect to his own safety, the car started with a sudden and violent jerk, causing the injury now being inquired into, then the burden is thrown upon the defendant to show, to the satisfaction of the jury, that the horses hitched to the car were suitable for the service in question, or that the accident was not due to the horses, and that the servant of defendant managing the car exercised the utmost care, skill and foresight in the management of the same, or that the accident occurred by reason of some cause not under the control of defendant, or its servants and employees; and unless the defend-

[197] Doolittle v. Southern Ry., 62 S. C. 130.
[198] Approved in Georgia Pac. R. Co. v. West, 66 Miss. 310.
[199] Approved in Curtis v. Detroit & M. R. Co., 27 Wis. 158.

ant has so satisfied the jury, their verdict should be for the plaintiff.[200]

Shifting of burden.

(699) The court instructs the jury that when injury or damage happens to a passenger (on a railroad) by a collision, or by any other accident occurring on the road, the prima facie presumption is that it occurred by the negligence of the railroad company, and the burden of proof is on the company to establish that there has been no negligence whatsoever, and that the damage has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent.[201]

Burden of proof of invitation to alight.

(700) The court instructs the jury that, the proof must show affirmatively that the plaintiff was a passenger upon the road of the defendant, and as such passenger was injured by the acts and negligence of the defendant and the employees of the defendant; the proof must also show that the plaintiff was induced to believe from the acts or words of the employees of the defendant, that it was intended the plaintiff should alight from the train at the time and place when and where he had alighted from said train of cars.[202]

Effect of failure of evidence as to cause of injury.

(701) The court instructs the jury that defendant is not required to prove what caused the train to get beyond the control of the train men; and even if the jury cannot find from the evidence the exact cause, or if such cause is unknown and has not been shown, still if after considering all the testimony in the case not only that offered by defendant, but also that offered by plaintiff, yet even if there was not any negligence

[200] **Approved in Dougherty v. Missouri R. Co., 97 Mo. 647.**

[201] **Approved in Shenandoah Val. R. Co. v. Moose, 83 Va. 827.**

[202] **Approved in International & G. N. R. Co. v. Eckford, 71 Tex. 274.**

on the part of defendant of the character submitted to your consideration, then the defendant must have the verdict that (Feary) its passenger received his injury without any fault upon its part.[203]

(702) The court instructs the jury that, if the jury does not believe from the evidence that the plaintiff's employees were guilty of negligence as hereinbefore defined in the particulars specified and charged as acts of negligence in plaintiff's petition, or if plaintiffs were guilty of such negligence, or if you do not find that plaintiff received any such injuries as she complains of or that such injuries, if received, were not caused by such negligence, on the part of defendant's employees, you will return a verdict for the defendant.[204]

CHAPTER XXXII.

CHATTEL MORTGAGES.

Nature of transaction, 703.
Sufficiency of description of property covered, 704, 705.
Mortgages to secure future advances, 706.
Effect of partial invalidity of mortgage, 707.
Retention of possession by mortgagor as evidence of fraud, 708-711.
Possession after condition broken, 712, 713.
Right of possession under insecurity clause, 714.
Liability of mortgagees for wrongfully taking chattels from possession of mortgagor, 715, 716.
Same—Burden of proof, 717.
Priority between chattel mortgage and agister's lien, 718, 719.
Priority between chattel mortgage and execution, 720-722.
Renewal, 723.

Nature of transaction.

(703) The court instructs the jury further that the foun-

[203] Approved in Feary v. Metropolitan St. Ry. Co., 162 Mo. 75. This instruction was given where petition charged that the accident was caused by defendant's negligence.

[204] Approved in Houston & T. C. R. Co. v. Dotson, 15 Tex. Civ. App. 73.

dation of the mortgage is the note therein described; that the mortgage is a mere security for the payment of the note, and the plaintiff cannot recover in this suit, unless he has proven the existence of the note described in the mortgage, if any is described; and if the note described in the mortgage has not been introduced in evidence, nor its absence accounted for, and there is no evidence showing the existence of such a note, the plaintiff cannot recover, and the jury will find for the defendant.[1]

Sufficiency of description of property covered.

(704) The court instructs the jury that the property covered by a chattel mortgage is sufficiently described where it can be rendered sufficiently definite by evidence of the facts as to the property, and if you find that there was no fraud in the giving of the mortgage the fact that the property is described as (here insert description, as all the dry goods, boots and shoes, millinery goods and gentlemen's furnishing goods and stock in trade now in the store occupied by the mortgagor) will not invalidate the mortgage if you further find that the property can be identified by other evidence.[2]

(705) The court instructs the jury that a person claiming property under a chattel mortgage, must see to it that the property is correctly and truly described, so that others may not be deceived. The mortgage must speak for itself, and it is for the jury to determine whether the property therein described is the same property replevied in this suit, and if it is not, then plaintiff cannot recover.[3]

Mortgages to secure future advances.

(706) The court instructs the jury that a mortgage may be given to secure a future advance, and if you find that the

[1] Approved in Bell v. Prewitt, 62 Ill. 361.
This is an action of replevin by the chattel mortgagee.
[2] Conklin v. Shelley, 28 N. Y. 360.
[3] Approved in Bell v. Prewitt, 62 Ill. 361.
This is an action of replevin by the chattel mortgagee.

mortgage was given to secure a debt actually due, the fact that it was also intended to secure future advances to the mortgagor on credit will not invalidate the mortgage to the extent of any advances actually made in good faith before any third person acquired a subsequent title to or lien on the goods.[4]

Effect of partial invalidity of mortgage.

(707) The court instructs the jury that if the mortgage authorizes the mortgagor to sell a part of the property for his own benefit it is void as to all the property embraced in it, and if you believe from the evidence that (here insert the facts partially invalidating the mortgage, as that the mortgage covered the stock and fixtures of a saloon, and by its terms permitted the mortgagor to remain in possession thereof and sell the stock for his own benefit) then the mortgage is void as to all the property embraced in it.[5]

Retention of possession by mortgagor as evidence of fraud.

(708) The court instructs the jury that the fact that the mortgagor is in possession raises the legal presumption of fraud which becomes conclusive unless you believe from the evidence that the retention was made in good faith and without any intent to defraud the creditors of the mortgagor.[6]

(709) The court instructs the jury that a chattel mortgage not accompanied by immediate delivery or followed by an actual or continued change of possession of the chattels mortgaged, and executed on an agreement that the mortgagor may remain in possession and sell the property and use the avails in substantially the same manner as before the execution of the mortgage, is void as against the creditors of the mortgagor, and you are further instructed that the term "creditors" includes all persons who were such while the

[4] Carpenter v. Blote, 1 E. D. Smith (N. Y.) 491.
[5] Hangen v. Hackemeister, 114 N. Y. 566.
[6] Sperry v. Baldner, 46 Hun (N. Y.) 120.

chattels remained in possession of the mortgagor under the agreement.[7]

(710) The court instructs the jury that fraud in the mortgage may be cured by delivering possession, and though you find that the chattel mortgage be void by reason of the conduct of the parties thereto with respect to the mortgaged property, that fact will not invalidate the mortgage as against the mortgagor's creditors where there is shown a subsequent delivery of the possession of the property by the mortgagor to the general assignee of the mortgagees to secure or satisfy the claim secured by the mortgage.[8]

(711) The court instructs the jury that a chattel mortgage containing a condition that the mortgagor shall remain in possession thereof, and continue to sell the same in the ordinary course of business, is void as to other purchasers, in good faith, and subsequent creditors of the mortgagor. But when the mortgage contains no such condition, the presumption of good faith attaches when the mortgagee is in possession, and the burden of proving fraud is upon him who alleges it.[9]

Possession after condition broken.

(712) The court instructs the jury that the mortgagee to retain his lien after condition broken on the property, which under the contract has remained in possession of the mortgagor, must take possession within a reasonable time after default, and you are further instructed that in determining what is a reasonable time you may take into consideration the situation of the parties and all the circumstances.[10]

(713) The court instructs the jury that where the mortgagee has a right by the terms of the mortgage to take pos-

[7] **Mandel v. Avery, 124 N. Y. 376.**
[8] **Bowdish v. Page, 153 N. Y. 104.**
[9] **Pike v. Colvin, 67 Ill. 227.**
[10] **Read v. Eames, 19 Ill. 594; Case v. Perkins, 23 Ill. 382.**

session whenever he feels unsafe or insecure, he is the sole judge of the happening of the contingency, but the right to take possession must be exercised only in good faith on reasonable grounds of a belief that there is danger.[11]

Right of possession under insecurity clause.

(714) The court instructs the jury that defendant justifying under a mortgage containing the clause that in case the mortgagee should at any time deem himself unsafe it should be lawful for him to take and sell the property for payment, it is enough to show that he deemed himself unsafe in good faith, and it is not incumbent on him to show actual danger.[12]

Liability of mortgagee for wrongfully taking chattels from possession of mortgagor.

(715) The court instructs the jury that under the mortgage defendant had the right to take possession of all the property therein described, at any time he chose to do so, and no damage could be assessed against him for such taking. He did not, however, have any right to sell said property before the debt secured thereby became due. In other words, while he would have a right under said mortgage, to take possession of all the property therein described, for the purpose of preserving the same until the debt became due, he would have no right to sell the said property unless the debt secured by said mortgage, or some part of it, was due; and, if he did sell said property, or any part of it, before the debt secured thereby became due, or any part thereof, then he is liable to account to the plaintiffs for the fair and reasonable value of the property so sold, without reference to the amount for which the sale was made.[13]

(716) The court instructs the jury that this is an action of replevin by plaintiff ——— against the defendant ———

[11] Roy v. Goings, 96 Ill. 361.

[12] Allen v. Vose, 34 Hun (N. Y.) 57.

[13] Approved in Koster v. Seney, 100 Iowa, 558.

to recover the possession of property described in the affidavit, writ and declaration. The plaintiff claims that he was in the lawful possession of the property and that defendant wrongfully took and unjustly detained the same. The defendant claims a right to the possession of the property under a chattel mortgage which he held upon the property. The court instructs the jury that to entitle the plaintiff to recover in this action, it is only necessary for him to show that the property was taken wrongfully from his possession by the defendant or by some one acting for the defendant, that is, to justify the taking by the defendant, there must have been a violation of some of the conditions of the mortgage by the plaintiff and if the jury believe from the evidence that the property was wrongfully taken by the defendant from the plaintiff and that the conditions of the mortgage were not violated, then you will find the defendant guilty.[14]

Same—Burden of proof.

(717) The court instructs the jury further that the burden of proving his case is on the plaintiff, and in order to recover in this suit, he must prove, by a preponderance of the evidence, that the defendant wrongfully took the cattle in controversy, or that he wrongfully detained them after demand made by the plaintiff.[15]

Priority between chattel mortgage and agister's lien.

(718) The court instructs the jury that if they believe from the evidence, that the defendant, P., pastured certain cattle and other stock for C. (mortgagor) during the summer of 19—, and that on or about ——— took away a portion of the stock and then agreed that a portion of the cattle should remain in P.'s possession as a pledge or security for the payment of the pasturage on the entire lot of stock; and that if

[14] Mathews v. Granger, 71 Ill. App. 467.

[15] Approved in Bell v. Prewitt, 62 Ill. 361.

This is an action of replevin by the chattel mortgagee.

the said pasturage was not paid by the ———, that in that case P. was to be the owner of the cattle, and they were to be taken for the pasturage; and if they further believe, from the evidence, that the pasturage was not paid, and that the cattle were the same replevied, then the law is that P. is the owner of the cattle, and the jury will so find, and will find, as a part of their verdict, that the same defendant is the owner of the cattle in controversy.[16]

(719) The court instructs the jury that if they believe from the evidence, that the defendant, P., pastured certain stock during the summer of ———, for C., and if they further believe, from the evidence, that, on or about the ——— day of ———, 19—, the said C. took any or part of the stock under an agreement with said P.; that a portion of the steers should remain in P.'s possession as a pledge or security for the payment of the pasturage for the entire lot of stock; and if they further believe, from the evidence, that the pasturage was, and still is, unpaid, and that the cattle thus pledged are the same as those replevied in this suit, then the law is, that P. had a special property in the cattle pledged until the payment of the account for which they were pledged, and the jury will find for the defendant.[17]

Priority between chattel mortgage and execution.

(720) The court instructs the jury that under a mortgage like the one in evidence before the jury in this case, the mortgagee is entitled to the immediate possession of the property mortgaged, and may take the same, and reduce the same into possession, at any time before the rights of creditors, or third persons, attach by purchase, or by lien under execution.[18]

(721) The court instructs the jury that if they believe

[16] Approved in Bell v. Prewitt, 62 Ill. 361.
This is an action of replevin by a chattel mortgagee.
[17] Approved in Bell v. Prewitt, 62 Ill. 361.
This is an action of replevin by the chattel mortgagee.
[18] Whisler v. Roberts, 19 Ill. 274.

that the property in question was voluntarily delivered to the plaintiff, as mortgagee to remain in his possession before the issuance of the executions against the mortgagor, S., and delivery thereof to the defendant, and that afterwards, and while the executions were in the hands of the defendant, it was voluntarily surrendered by the plaintiff to S., then the plaintiff would waive his right to claim the property, as against the creditors of S., and the executions in the hands of the defendant would become a lien on the property.[19]

(722) The court instructs the jury that if they believe from the evidence, that the only claim by the plaintiff to the property in question was derived from the mortgage in evidence, and that the property was retained in the possession of the mortgagor, S., after the expiration thereof, and that while it was in his possession the execution described in the answer was placed in the hands of the defendart, then the law is, that the property was liable to such execution.[20]

Renewal.

(723) The court instructs the jury that it is the duty of a mortgagee to re-file the chattel mortgage at the close of one year from its filing, and if you find that the mortgage was not so filed then one purchasing the chattels in good faith and for value will obtain a clear title to such chattels, and this is the rule though the purchaser bought the chattels before the close of the year.[21]

[19] Whisler v. Roberts, 19 Ill. 274.
[20] Whisler v. Roberts, 19 Ill. 274.
[21] Beskin v. Feigenspean, 32 App. Div. (N. Y.) 29.

CHAPTER XXXIII.

CIVIL DAMAGE ACT.

Liability where liquors producing intoxication were sold by different dealers, 724-731.
Notice to liquor seller, 732.
Sale by successor of licensee, the license not having been transferred, 733, 734.
Recovery against seller for homicide committed by intoxicated person, 735.
Effect of purchase and use of liquors by wife on her right to recover, 736.
Right of wife to sue where liquors bought by wife for husband's use, 737.
Loitering, 738.
Burden of showing that liquors sold by defendant caused intoxication complained of, 739.
Presumptions as to place where liquors were obtained, 740.
Damages recoverable, 741, 742.
Same—Recovery for nursing husband, 743.
Same—Amount dependent on expectancy of life and probable earnings, 744, 745.
Same—Amount as dependent on station in life of wife, 746, 747. 747.
Admission of execution of dealers' bond by failure to deny in answer, 748.

Liability where liquors producing intoxication were sold by different dealers.

(724) The court instructs the jury that whatever the fatal cause of the death of the said ——— was, if it was inspired or contributed to by the state of intoxication caused in whole or in part by said traffic of the defendants and the sale or giving to the said ——— intoxicating liquors, then the defendants would be liable.[1]

(725) The court instructs the jury that if from the evidence they believe that the said ——— was intoxicated at the time he upset and overturned his sled and lost his team,

[1] Approved in Scott v. Chope, 33 Neb. 41.

and that the defendants sold any part of the liquors that produced such intoxication, and that he upset his sled and lost his team in consequence of such intoxication, and that in endeavoring to reach home on foot he became exhausted, and that such exhaustion was caused by reason of his being compelled to walk, and that he was unable to reach home and was frozen to death, the defendants would be liable.[2]

(726) The court instructs the jury for the plaintiff, that if they believe, from the evidence, that ———, the husband of the plaintiff, came to his death on account of his intoxication, and that said intoxication was caused, wholly or in part, by intoxicating liquor sold or given to the said ——— by the defendants, then the verdict of the jury should be for the plaintiff, with such damages as, in the judgment of the jury, from the evidence, the plaintiff is entitled to recover, not exceeding in the aggregate the amount claimed in the declaration.[3]

(727) The court instructs the jury that if you are satisfied, under the evidence and the law as given you by the court, that these parties did either of them sell or furnish ——— the liquors, and that the sale or furnishing contributed to the death of this man, then give the plaintiff such a judgment as you think she is entitled to, not exceeding the amount claimed in the declaration. If, on the other hand, you find that they, or either of them, did not sell or furnish him the liquor, then, no matter how unfortunate she may have been, she has no claim upon them for a judgment in this case.[4]

(728) The court instructs the jury that this action is brought against two separate dealers in intoxicating liquors and their respective bondsmen, not because it is claimed that

[2] Approved in Scott v. Chope, 33 Neb. 41.

[3] Flynn v. Fogarty, 106 Ill. 263.

[4] Moreland v. Durocher, 121 Mich. 398.

Approved and held not to authorize recovery against all defendants on proof of sale by one only.

such dealers are or were associated together in business, but upon the ground that each sold intoxicants to ———, the husband of the plaintiff, that helped to produce the intoxication it is claimed he was laboring under at the time he received the injuries that resulted in his death. You cannot lawfully render a judgment against all of these parties unless you find that the deceased had received intoxicating liquor from both ——— and ——— (liquor dealer defendants), and that the liquors so received contributed to the intoxication that he was laboring under at the time he received his injury.[5]

(729) The court instructs the jury that where several liquor dealers furnish the intoxicating liquors, the use of which results in intoxication and damage, that each dealer is equally liable, and that in case one dealer furnished the first draught while the user thereof was perfectly sober and the liquor which intensified and completed the intoxication was furnished by other parties, the dealer furnishing the first draught is equally liable with the others for the damage resulting from such intoxication.[6]

(730) The court instructs the jury that the amount of a sale is not material, nor is it material that the sale should be the one which produced the final intoxication; but the saloonkeeper or the person furnishing intoxicating liquors is responsible for all damages which may accrue as the result of his sales, if a person obtains but one drink and then drinks at other places sufficient to intoxicate him. And, if the death is established as a result of sales by more than one person, you are not required to find which one furnished the liquor that caused the death.[7]

[5] Moreland v. Durocher, 121 Mich. 398.
[6] Dolan v. McLaughlin, 46 Neb. 449.
[7] Approved in Scott v. Chope, 33 Neb. 41.

(731) The court instructs the jury that it is not necessary that the liquor which caused the intoxication alleged in the complaint should have been all sold to the husband of plaintiff by the said defendant, if the defendant sold the husband of plaintiff liquor which contributed or helped to bring about the intoxication alleged in the complaint, this would be sufficient to make defendant liable for injuries resulting from such intoxication. If from the evidence you believe that husband of plaintiff while intoxicated, injured or destroyed any of plaintiff's household goods you will say whether or not the intoxicating liquor by which his intoxication at that time was produced, if you believe from the evidence that plaintiff's husband was intoxicated, was caused in whole or in part by liquor sold him by defendant. If defendant contributed to such intoxication he would be liable.[8]

Notice to liquor seller.

(732) The court instructs the jury that the question of the sufficiency of this notice is partly a question of law and partly a question of fact. I think a notice in any given form of words might be legally sufficient under some circumstances and with the existence on the part of the defendant of certain knowledge of facts, which under other circumstances and with ignorance of those facts might not be. It seems to me in connection with this notice that the plaintiff must satisfy you that at the time the notice was given, the defendant knew or he then reasonably ought to have known that the person whose name was signed to the notice in signing and giving notice was acting as the daughter of ——— (the party to whom sale was made). It is not necessary, as a matter of law, that he should have had personal acquaintance with her.[9]

[8] Approved in Kearney v. Fitzgerald, 43 Iowa, 580.

[9] Sackett v. Ruder, 152 Mass. 397.

Sale by successor of licensee, the license not having been transferred.

(733) The court instructs the jury that it would be the duty of a person going out of the saloon business, selling and transferring his property, to return his license under which he was transacting business to the authority granting the license and have the same canceled, and if he did not do this, that he would be held liable for all damages accruing as the result of the sales of intoxicating liquors by his successor in business.[10]

(734) The court instructs the jury that an individual or partnership taking out a license for the sale of intoxicating liquors cannot sell and transfer that license to another person or party; and if they do sell and transfer their business, together with their rights under the license, the purchaser would be holden to their agent and they would be liable for all sales made by him under and by virtue of such license. And if the bondsmen of such license holder knew of such sale and transfer and took no steps to relieve themselves from liability, their liability will continue.[11]

Recovery against seller for homicide committed by intoxicated person.

(735) The court instructs the jury that if you should find from the evidence that the deceased came to his death by violence inflicted by any other person, and should further find that the person inflicting the violence was intoxicated at the time and that he obtained the liquors which caused his intoxication from the defendants, or either of them, and that he would not have used the violence that caused the death except as a result of such intoxication, then, and in that case, such of the defendants and their bondsmen as furnished such intoxicating liquors would be equally liable.[12]

[10] Approved in Scott v. Chope, 33 Neb. 41.
[11] Approved in Scott v. Chope, 33 Neb. 41.
[12] Approved in Scott v. Chope, 33 Neb. 41.

Effect of purchase and use of liquors by wife on her right to recover.

(736) The court instructs the jury that it is claimed that the plaintiff was accustomed to purchase intoxicating liquors of the defendant and of others, and to take it to their home. If this be so, it becomes important to inquire for what purpose she bought and used such liquors. If it was bought and taken to the house for medical purposes only, and was in good faith prepared and used as a medicine for existing physical ailments, such purchase and use would be lawful and innocent, and ought not to operate to the prejudice of the plaintiff. If, however, it was not bought for such purpose, but was purchased and intended and used as a beverage for herself and the said ———, her husband, the case assumes a different aspect. If the said ———, her husband, was in the habit of getting intoxicated, and the plaintiff, knowing this habit, voluntarily drank intoxicating liquors with the said ———, her husband, at the bar of the defendant, and voluntarily bought of defendant intoxicating liquors to be taken to their home and to be drank by herself and the said ———, her husband, as a beverage, this would not only be encouraging the said ———, her husband, in his intemperate habits, but would be an apparent sanctioning on her part of the sales of liquor by the defendant to the said ———, her husband. This law is intended to furnish redress and compensation to innocent sufferers, and not to those who have, by their acts and conduct voluntarily and knowingly encouraged and contributed to bring about a state or condition in another who, while in such state or condition, does the wrongs of which they complain. If the plaintiff and the said ———, her husband, voluntarily drank at the bar of the defendant, and if the plaintiff voluntarily bought liquor of defendant to be drank by her and the said ———, her husband, she would not be placed in the attitude of an innocent sufferer, and as such entitled to the redress which the statute designs.[18]

[18] Kearney v. Fitzgerald, 43 Iowa, 580.
Criticism on use of w[redacted] but instruction approved.

(737) The court instructs the jury that if, however, such drinking, either at the bar or at home, was not voluntary on her part, or if she bought and took intoxicating liquor to their home not with the view of her own drinking, but for the sole purpose of keeping her husband at home, and of keeping him from squandering his time and money in saloons, she would forfeit none of the benefits which the statute gives.[14]

Loitering.

(738) The court instructs the jury that you must notice that under the count for loitering, as under the counts for sales in the declaration, you are only to allow damages for a particular occasion,—some particular occasion proved other than the occasion when sales were made. If you find yourself led to the conclusion in which you award damages to the plaintiff, you must not go upon the idea that ——— (the party loitering) was allowed to loiter there from day to day, from time to time, other than from ——— to ——— (the period alleged), and that the plaintiff is entitled to recovery under these counts for what you might call a general loitering from day to day. It is only for specific occasions.[15]

Burden of showing that liquors sold by defendant caused intoxication complained of.

(739) The court instructs the jury that before defendants can be held liable it must appear that the liquors furnished by them were the efficient and proximate cause, either wholly or in part, of the intoxication complained of.[16]

Presumptions as to place where liquors were obtained.

(740) The court instructs the jury that if a man addicted to drinking goes to a saloon where intoxicating liquors are sold, apparently sober, and having remained there a sufficient

[14] Approved in Kearney v. Fitzgerald, 43 Iowa, 580.
[15] Approved in Sackett v. Ruder, 152 Mass. 397.
[16] O'Halloran v. Kingston, 16 Ill. App. 659.

time, is found intoxicated, the fair presumption would be that his intoxication is due in part, at least, to intoxicating liquor procured at such saloon.[17]

Damages recoverable.

(741) The court instructs the jury that if you believe that the plaintiff had been for the last ten years the wife of ———; that for several years previous to the commencement of this suit he was habitually intoxicated; that within two years before the commencement of this action the defendant sold or gave to him intoxicating liquor, and thereby caused his intoxication in whole or in part; that by reason of said intoxication the said ——— was rendered incapable of performing and transacting his ordinary business; that the plaintiff was dependent upon him for support; that in consequence of said intoxication she has been injured in means of support, then you will return a verdict for the plaintiff for such damages as from the evidence you may believe she has sustained in consequence thereof not exceeding $———, the amount set out in the complaint.[18]

(742) The court instructs the jury that under this declaration damages can be assessed only once for any sale. The declaration in specific counts alleges single sales on December 3, 4, 5, and then the general allegation for sales covering a period from March to December. Now as to the allegation from March to December, although it covers the same period as that covered by the other counts, yet you might allow damages under that count for a sale if proved, provided it is not a sale for which you allow damages under any other count; but there must be only one allowance of damages for one sale, and only one sale allowed for under any count. In order to entitle plaintiff to recover it is not necessary that the plaintiff should prove that the sales were made on the particular

[17] Approved in Kearney v. Fitzgerald, 43 Iowa, 580.

[18] Approved in Jockers v. Borgman, 29 Kan. 109.

dates set out in the declaration. In order to recover under the counts covering a period of time the plaintiff must show a sale within the period named. Under counts where particular dates are set out, the plaintiff might recover for injuries which she suffered by reason of a sale made on any day not used as a basis for recovery under any other count.[19]

Same—Recovery for nursing husband.

(743) The court instructs the jury that if they should believe from the evidence that the plaintiff took care of her husband and spent her time in nursing and taking care of him, yet she cannot, in this suit, recover for the time so spent, and the jury in making up their verdict will entirely disregard the time so spent as an element of damage, unless the loss of time thus spent injured her in property or means of support. (This latter clause is only to be added in case there is evidence showing that the time so spent did injure the wife in her property or means of support.)[20]

Same—Amount dependent on expectancy of life, and probable earnings.

(744) The court instructs the jury that they may estimate, from all the evidence in the case, the prospective length of life of the husband of said plaintiff had he not been killed (if he was so killed on the ——— day of ———, 19—), and may take this estimate into consideration, together with all other facts and circumstances shown in evidence, in fixing the amount of the plaintiff's damages, in case the jury finds for the plaintiff.[21]

(745) The court instructs the jury, that if you find for the plaintiff, then in estimating the plaintiff's damages, if any, in this case, you may take into consideration not only the wages and earnings of the plaintiff's husband for any

[19] Approved in Sackett v. Ruder, 152 Mass. 397.
[20] Meidel v. Anthis, 71 Ill. 241.
[21] Approved in Betting v. Hobbett, 142 Ill. 72.

given period as shown by the evidence, so far as you may believe, from the evidence, that such wages and earnings furnished a means of support for the plaintiff, but also the probable length of the life of said husband till terminated by natural causes, if, and so far as, it may be shown by the evidence, from the ——— day of ———, 19—, had he not been killed upon that day.[22]

Same—Amount as dependent on station in life of wife.

(746) The court instructs the jury that the law requires that a husband shall provide for his wife reasonable support according to her rank and station in society; and to this end she is entitled with her husband and family to share his property and proceeds of his labor.[23]

(747) The court instructs the jury that it is the duty of the husband to furnish his wife with support and maintenance in a manner corresponding with their circumstances and condition in life. And it is the duty of the husband to provide for his wife reasonable support according to her rank and station in society and to that end she is entitled with her husband and family to share his property and the proceeds of his labor. It is not to be understood that a husband is only obligated to furnish a bare subsistence to his wife, that is food and clothing, but to the extent of his ability, he is under an obligation to provide those comforts and surroundings reasonable and necessary in the society in which she lives, and the jury in considering the damages to be recovered by plaintiff, if they find for plaintiff, will therefore consider the station in life in which the plaintiff and her husband moved.[24]

Admission of execution of dealers' bond by failure to deny in answer.

(748) The court instructs the jury that every material allegation in the petition not controverted and denied in the an-

[22] Approved in Betting v. Hobbett, 142 Ill. 72.
[23] Approved in Thill v. Pohlman, 76 Iowa, 638.
[24] Thill v. Pohlman, 76 Iowa, 638.

swer is to be taken as true; and further, that the allegation in the petition that the defendant ——— (surety) signed the bond of ——— (dealer) is not controverted or denied in the answer, and therefore is to be taken as true.[25]

CHAPTER XXXIV.

COMPROMISE AND SETTLEMENT.

Compromise as consideration for note, 749.
Settlement between parties without knowledge of attorney, 750.
Binding effect of compromise, 751-753.

Compromise as consideration for note.

(749) The court instructs the jury for the plaintiff, that if they believe from the evidence, that the plaintiff, in the month of ———, 19—, in good faith supposed he had a cause of action against the defendant, on account of personal injuries which he believed resulted from the conduct of the defendant, and thereupon threatened to sue the defendant on account thereof, and thereupon the difference between them was compromised, and the defendant executed the note sued on in consideration that the plaintiff would not sue him for such injuries, and the plaintiff accepted such note in settlement of such claim, such compromise and settlement is a good and lawful consideration for such note.[1]

Settlement between parties without knowledge of attorney.

(750) The court instructs the jury that when parties have gone to law about a matter, they may settle between themselves with the intervention of an attorney on either side, or with an attorney on one side, if they see fit to do so; but after an action is commenced, and the parties appear with an attor-

[25] Approved in Scott v. Chope, 33 Neb. 41.
[1] Parker v. Enslow, 102 Ill. 272.
Use of word "supposed" instead of "believed" upheld.

ney in court, any settlement of the claim out of court without the knowledge or consent of the attorney is to be viewed with suspicion. If there is any fraud in the case, such a settlement may be set aside.[2]

Binding effect of compromise.

(751) The court instructs the jury that if these two men made an unfounded claim (they claim here this lumber was not according to contract), and made that knowingly, knowing there was no color of right to it, but asserted an unjust claim, and induced the parties to compromise, under the circumstances, in order to avoid litigation, etc., it would not be binding on the company here; but, if these two men did find fault with the lumber, and had good reason for finding fault, if it did not comply with the contract, and they talked about it, and they finally made this offer in good faith, and these parties said, "We will take the money," and took it, they are bound by the contract, because, in that case, there would be a valid dispute between the parties, settled up by agreement. On the other hand, if it were a fraudulent scheme on the part of these parties to beat defendant out of money, it would not be binding.[3]

(752) The court instructs the jury that if they find that the parties met and this matter was all settled up, and was so understood by the parties, each party presenting a claim against the other, and the pretended settlement was not a myth, but a reality, that constitutes a good defense to this action, and the verdict must be for the defendants.[4]

(753) The court instructs the jury that there is no fraud, in ordinary cases, in refusing to pay or settle without litigation; and if the jury believe from the evidence that the agent of defendant disputed the claim of plaintiff, and told the plaintiff that he could not recover against the defendant in

[2] Approved in Falconio v. Larsen, 31 Or. 137.

[3] Approved in Nash v. Manistee Lumber Co., 75 Mich. 351.

[4] Approved in Doyle v. Donnelly, 56 Me. 26.

this case, and gave it as his opinion that he (plaintiff) had no legal rights, as against the defendant, on which he could recover, and the plaintiff had the same means of knowledge with the agent of defendant, and he believed said agent and relied upon the representations thus made by the agent of the defendant, and then and there made a hasty settlement with the agent, and that the settlement was made under threat that no payment would ever be made without long and costly litigation, then the jury are instructed that this is not fraud of such a character as would avoid a settlement thus made, although the amount received by plaintiff was but nominal. Plaintiff was bound by his own interest to inform himself of his rights, before acting, and to stand upon those rights, and if he failed to do so, and settled at a much smaller sum than he was entitled to, he himself is responsible for his loss, and cannot recover an additional sum over and above the sum already received. It makes no difference that the payment was made by draft on the defendant; if plaintiff took the draft, and never presented it for payment, it is his fault, and not the fault of the defendant, that the draft is not paid.[5]

CHAPTER XXXV.

CONCEALING BIRTH.[1]

What constitutes offense, 754.
No defense that concealment was only to avoid shame, 755.
Immaterial whether child born alive, 756, 757.

What constitutes offense.

(754) The court instructs the jury that if they believe from the evidence, that the defendant, at any time within three years next before the finding of this indictment was

[5] Aetna Ins. Co. v. Reed, 33 Ohio St. 283.

[1] See Criminal Law for forms of instructions applicable to crimes generally.

pregnant with child, and was then and there delivered of said child, and that said defendant, after being so delivered of said child, did, within the time and at the county aforesaid, knowingly and willfully endeavor privately to conceal the birth of said child by secretly partly burning the body thereof, or by secretly hiding the body of the said child so that it was not and could not be known, then and there, whether the said child was born alive or not, then they will find her guilty.[2]

No defense that concealment was only to avoid shame.

(755) The court instructs the jury that though they may believe from the evidence that defendant felt great shame and mortification at the birth of said child, still such feelings are no defense to this prosecution, and the jury should not acquit on such grounds.[3]

Immaterial whether child born alive.

(756) The court instructs the jury that the question as to whether said child was born dead or alive is not submitted to the consideration of the jury; the crime under this indictment being complete, if the jury shall believe from the evidence that defendant within the time, and at the county aforesaid, was pregnant with and delivered of a child, as charged in the indictment, and that after being so delivered of said child, she then and there, knowingly and willfully, that is to say, understandingly and intentionally, endeavored privately to conceal the birth of said child by secretly partly burning the body of said child, or by secretly hiding the same, so that it was not and could not be known, then and there, whether the said child was born alive or not.[4]

(757) The court instructs the jury that this is not a prosecution for the murder of said child, nor is it material to the finding of a verdict of guilty that the jury should know

[2] State v. White, 76 Mo. 96.
[3] State v. White, 76 Mo. 96.
[4] State v. White, 76 Mo. 96.

whether said child was killed, or whether said child was born dead or alive. It is sufficient, under this indictment, if the jury shall believe from the evidence that the defendant was pregnant with, and delivered of a child, and after being so delivered, in manner and form as charged in the indictment, endeavored privately to conceal the birth of said child, and that by such endeavor to conceal such birth she then and there destroyed the means of knowing or ascertaining whether said child was born alive or not.[5]

CHAPTER XXXVI.

CONSIDERATION.

Sufficiency of consideration, 758.
Same—Consideration for suretyship, 759.
Action on note, consideration of which is certain letters patent, 760-763.
Compromise as consideration, 764.
Dismissal of suit as consideration, 765.

Sufficiency of consideration.

(758) The court instructs the jury that they must find from the evidence that the defendant received a valuable consideration from the plaintiff, which induced him to make the contract sued upon in this case, as a naked promise is void. If the jury find from the evidence that the defendant desired to aid in the support of his sister, and agreed with the plaintiff that if the plaintiff would take care of his sister, he would pay the plaintiff the charges and expenses of the support and care of defendant's sister, then the plaintiff will be entitled to recover what such support and care was reasonably worth considering the situation in life, occupied by the sister and the plaintiff, if the jury believe from the evidence that the

[5] State v. White, 76 Mo. 96.

plaintiff in reliance upon the promise of the defendant, rendered services in the support and care of the sister.[1]

Same—Consideration for suretyship.

(759) The court instructs the jury that if a party sign a note as surety for another, in consideration that the principal shall receive the benefit thereof, such consideration is a valid consideration in law, and the signer thereby becomes liable to the lender as the principal, and in this case it is immaterial how much, if any, benefit the defendant received for signing said note, provided he signed it in consideration that ——— should receive credit for the amount of the same, and that ——— by reason thereof did receive such credit.[2]

Action on note, consideration of which is certain letters patent.

(760) The court instructs the jury that the specification accompanying the letters patent read in evidence, must in, and of itself, contain a full, clear and exact description of the invention, and if the object of the alleged patent ——— for ——— cannot be obtained when the specification is clearly followed out by competent workmen of ordinary skill and proficiency in the art of ———, without invention or addition of their own, or if in order to attain the object of the patent, information must be derived from other sources than the specification, as by experiments or from using other ingredients to make the thing described; or if it requires the solution of a problem; then and in either of said cases the letters patent are void, and the note sued on is without consideration and the jury must find for the defendants.[3]

(761) The jury are instructed that the inventor should confine his specifications to substances which he knows will answer the purpose for which they are used; that the speci-

[1] Howe v. Hyde, 88 Mich. 91.

[2] Approved in Broadwell v. Sanderson, 29 Ill. App. 384.

[3] Approved in Keith v. Hobbs, 69 Mo. 84.

fication accompanying the letters patent read in evidence makes use of the general term "water;" and if the jury believe from the evidence that the waters of the ——— in general use will not accomplish the end for which water is used in the said composition, either by reason of ——— or otherwise, then the specification is not sufficient and the letters are void; there was no consideration for the note sued on and the verdict must be for the defendants.[4]

(762) The jury are instructed that if they believe from the evidence that the alleged improved ——— is worthless and cannot be beneficially used for the purpose of ———, or if the jury should be satisfied from the testimony that any one or more of the ingredients mentioned in the specification as essential, is either disadvantageous or utterly useless, then, and in either of said cases, the letters patent are void and the verdict should be for the defendants.[5]

(763) The jury are instructed that the letters patent are *prima facie* evidence that the plaintiffs are the joint inventors of the so-called improved composition, yet, if that fact may be disproved, and if the jury should be satisfied from the testimony that said composition was invented by the plaintiff K. alone, and not by K. and E. jointly, the letters patent are void; there was no consideration for the note sued on, and the verdict must be for the defendants.[6]

Compromise as consideration.

(764) The court instructs the jury that the abandonment and discontinuance of a suit or action brought to enforce a doubtful right or claim, is a sufficient consideration for a promise and so is the compromise of a disputed claim made *bona fide* even though it ultimately appears that the claim compromised was wholly unfounded. If therefore, you should believe and find from the evidence that the note sued on in this case was given in consideration of a compromise

[4] Approved in Keith v. Hobbs, 69 Mo. 84.
[5] Approved in Keith v. Hobbs, 69 Mo. 84.
[6] Approved in Keith v. Hobbs, 69 Mo. 84.

of the suit instituted by plaintiffs on the $——— note, and that said suit was dismissed by plaintiffs, and that said agreement of compromise was carried out by the parties thereto, then you are instructed that said agreement forms a sufficient consideration for the note sued on.[7]

Dismissal of suit as consideration.

(765) The court instructs the jury that, if you believe and find from the evidence that L., defendant herein, in 19—, executed and delivered to plaintiffs, H., E. & Co., the $——— note introduced in evidence, and that plaintiffs had brought suit on said note in the ——— court of ——— County, ———, and had in such suit attached certain property of said defendant and that L., defendant, after the institution of said suit and while the same was still pending and undisposed of, agreed with plaintiff on the amount that was still due on said note for $———, and that in order to and for the purpose of procuring the dismissal of the suit then pending and a release from the attachment of property which had been levied on, or in order to and for the purpose of procuring an extension of the time of payment of the amount still claimed to be due by plaintiffs on said $——— note, agreed with plaintiffs or with their attorneys on a settlement of the differences existing between them as to the amount still due on said note, and in pursuance of said agreement the defendant in this suit, executed and delivered to the plaintiffs the note herein sued on, and the plaintiffs thereupon in consideration of the execution of said note, did in fact dismiss their suit on said $——— note and released the property which had been levied on in that case, and accepted in lieu of said note, the note herein sued on, then you are instructed that said agreement and the subsequent compliance therewith by the parties thereto, is a sufficient consideration for the note sued on, and you will find for plaintiffs.[8]

[7] Approved in Hunter, Evans & Co. v. Lanius, 82 Tex. 677.

[8] Approved in Hunter, Evans & Co. v. Lanius, 82 Tex. 677.

CHAPTER XXXVII.

CONTRACTS.

I. Formation of Contract and Offer and Acceptance.

Offer and acceptance, 766.
Acting on offer, 767.
Mutuality and certainty, 768.
Special and implied promise, 769.
Unsigned contract, 770.
Contract by correspondence, 771-773.
Liability for building material furnished by plaintiff on the order of a third person, 774.

II. Legality of Contract.

In general, 775.
Necessity that contract should be in writing, 776.
Public policy, 777.
Rights of parties to illegal contract, 778.

III. Interpretation and Effect.

In general, 779-783.
Interpretation of contract partly in writing, 784, 785.
Instructions where extrinsic evidence is necessary to aid interpretation, 786.
Recovery upon oral contract, 787.
Must abide by terms of contract, 788.
Interpretation of phrase "ready for occupancy," 789.
Intent or understanding of parties, 790-792.

IV. Performance of Contract.

Necessity of performance by plaintiff, 793.
Necessity of tender of performance, 794.
Sufficiency of performance in general, 795, 796.
Substituted performance, 797-799.
Substantial performance, 800-802.
Failure to furnish article on demand, 803.
Performance of agreement not to do business in a certain locality, 804.
Action on note payable when railroad shall be completed, 805-807.
Joint adventure of purchase and resale of lands, 808.
Action on contract to construct water-wheels, 809.

Violation of agreement to make loan, 810.
Delay in performance, 811.
Recovery for part performance or imperfect performance of contract, 812, 813.
Same—Recovery for work and labor, 814, 815.
Waiver of rights under contract, 816, 817.
Waiver of breach, 818.
Waiver of delay in performance, 819.
Acceptance of performance, 820.
Excuse for nonperformance, 821-823.
In general, 827-829.
Burden of proof, 825, 826.

V. Modification of Contract.
In General, 827-829.

I. Formation of Contract and Offer and Acceptance.

Offer and acceptance.

(766) The court instructs the jury that if they believe from the evidence that the lease of ——— was signed and left with the defendant for the purpose of procuring a written guaranty, and signed by S., and then to be forwarded to P., and that the same was not to become a binding contract between the parties until the same was so guarantied, then before P. was bound to regard the contract as completed he was entitled to a valid and binding lease guarantied by S.; and if not made in a reasonable time, or on notice by the defendant that he could not procure the guaranty of S., and that he might regard the contract at an end unless he would let him have it without security, this would end the contract, unless P. afterwards agreed to let him have it without security.[1]

Acting on offer.

(767) The court instructs the jury that if one person makes a proposition to another and without any formal acceptance the latter proceeds to avail himself of the proposition, this will constitute a virtual acceptance, and he will be as fully bound as if he had in terms accepted the offer.[2]

[1] Approved in Jordan v. Davis, 108 Ill. 336.
[2] Miller v. McManis, 57 Ill. 126.

Mutuality and certainty.

(768) The court instructs the jury, that if they find, from the evidence in this case, that in ——— the defendant, by its agent or agents, made a contract with the plaintiff, by which the defendant agreed to sell and deliver to the plaintiff, on the cars, at ———, sufficient ——— of its own manufacture, for the then current season's supply (ending ———) of the plaintiff's business, at the price of $——— per ton, to be delivered on plaintiff's orders or requisitions, from time to time, as fast as needed to keep up such supply, the plaintiff agreeing, in consideration thereof, to purchase said ——— of the said defendant, and to order the same as so needed, and to pay defendant therefor, at the price aforesaid, upon the delivery of each car load at ———, such a contract would be valid in law, and mutually binding upon the respective parties thereto.[3]

Special and implied promises.

(769) The court instructs the jury that this is an action upon a contract; that to support the action the contract must be proved; that a contract consists of mutual promises; that two kinds of promises are recognized in proof of contracts. One is a special promise and the other an implied promise. That the special promise is shown where the parties definitely and specifically fix the terms and conditions of their contract. The implied promise is a promise implied and arising from the acts and circumstances proved in a case where no special promise is proved. They consist of such acts and circumstances as raise in law an implication of those promises necessary to complete a contract.[4]

Unsigned contract.

(770) The court instructs the jury that the unsigned con-

[3] Approved in National Furnace Co. v. Keystone Mfg. Co., 110 Ill. 427.

[4] Noyes v. Loring, 55 Me. 408.

tract offered in evidence cannot be regarded as the contract of the defendant, upon which the plaintiff can recover as upon a written contract signed by him. It at the most can only be considered as a part of the transaction at the time of the negotiation and agreement between the parties. If said paper was read over to the defendant accurately and fully and fairly understood by him, and he assented and agreed to the terms therein stated, he is bound by said terms, and his liability will be determined accordingly.[5]

Contract by correspondence.

(771) The court instructs the jury that if they believe from the evidence that the only contract between the plaintiff and defendant is expressed in letters from the defendant to the plaintiff bearing date on the ——— and ——— days of ———, 19—, inclosing a printed circular mentioned therein and in letters from plaintiff to defendant bearing date on the ——— and ——— days of ———, 19—, and if the jury further believe from the evidence that the plaintiff by the letter dated the ——— day of ———, 19—, accepted the terms proposed to him by the defendant as shown by letters and circulars aforesaid without anything other or further in relation thereto between them, then such letters and circular constitute the contract between plaintiff and the defendant; and the parties are bound by the terms thereof, except as far as the same may have been subsequently modified by mutual agreement of the plaintiff and of the defendant, if, from the evidence, the jury believe that any such modification was subsequently made.[6]

(772) The court instructs the jury that if the jury believe that the contract between the plaintiff and the defendant consisted of letters and the circular mentioned in the last instruction above, then such contract was a contract in writing and

[5] Approved in Osborne & Co. v. Simmerson, 73 Iowa, 509.

[6] Approved in Shrewsbury v. Tufts, 41 W. Va. 212.

it bears date from the acceptance by the plaintiff of the terms proposed by the defendant in the year ———.[7]

(773) The court instructs the jury that if the jury believe from the evidence that the plaintiff made a contract with the defendant and that such contract is expressed in letters or in several writings, and a printed circular, and is the only contract between them, then the contract between the plaintiff and the defendant is a contract in writing and the parties are bound by the terms of the written contract.[8]

Liability for building material furnished by plaintiff on the order of a third person.

(774) The court instructs the jury that if they find from the evidence that a contract existed between plaintiff ——— and A. to furnish the goods in question for the house of the defendant, then such contract did not bind the defendant to pay plaintiff for them, unless the jury first find, from the evidence, that defendant subsequently assumed A.'s contract, and promised plaintiff ——— to pay him for the same; and that if the jury find such to be the case, defendant cannot be held liable to pay for any goods delivered before defendant made such agreement with plaintiff, for the reason that there is no consideration for such agreement, and the jury should give defendant credit for all money paid by him, to be applied in payment for goods furnished subsequently to such agreement by defendant with plaintiff.[9]

II. Legality of Contract.

In general.

(775) The court instructs the jury that if you believe from the evidence that the defendant agreed with the plaintiff that he would pay to the plaintiff a certain sum, if the plaintiff would stay with and care for the parents of the de-

[7] Approved in Shrewsbury v. Tufts, 41 W. Va. 212.
[8] Approved in Shrewsbury v. Tufts, 41 W. Va. 212.
[9] Owen v. Stevens, 78 Ill. 462.

fendant and of the plaintiff, such an agreement, if you find there was such an agreement, would be a lawful one.[10]

Necessity that contract should be in writing.

(776) The court instructs the jury that one person has a right by word of mouth to employ another to work for a third person, and such person may properly do such work upon the credit of the party making such employment, and not upon the responsibility of the party for whom the work is done, if there be a consideration therefor, and that if the jury believe from the evidence that defendant employed the plaintiff verbally to work for A., and the plaintiff performed services for A. in pursuance of the employment by defendant, then the plaintiff has a right to recover from defendant whatever the services rendered for A. were reasonably worth; and the contract of employment need not be in writing; and the provisions of the statute of frauds which provides that contracts of suretyship for another shall be in writing, will not be a defense.[11]

Public policy.

(777) The court instructs the jury that a promissory note given in consideration of an agreement on the part of the one to whom it is given that he will obstruct the course of public justice or suppress proceedings under a criminal complaint is void and cannot be enforced by the one to whom it is given. This, however, is not because the law seeks to favor the defendants in such a transaction, the law looks upon the parties as entirely at fault and refuses to lend its aid to either in a case where both are guilty of trying to impede the course of public justice. It is therefore not sufficient to defeat the plaintiff's action for the defendants to show that they gave the note in question upon their understanding that by so doing, the party complained of as having committed a crim-

[10] Waldron v. Alexander, 136 Ill. 550.

[11] Moshier v. Kitchell, 87 Ill. 18.

inal offense would be discharged from custody and the prosecution against him dropped. The defendant must show also that this understanding and arrangement was participated in by the plaintiff.[12]

Rights of parties to illegal contract.

(778) The court instructs the jury that if they believe from the evidence that the plaintiff has never been paid for the services here sued for and that the plaintiff executed the release introduced in evidence in this case and that at the time he executed such release, he knew the purpose for which it was executed to be to ———, then the plaintiff is *particeps criminis* to an immoral and unlawful act and plaintiff cannot recover. The services having been fully performed by the plaintiff, and the release having been executed by him, importing a consideration, neither law nor good morals will permit the parties to invalidate the release by showing the moral turpitude of the parties signing it.[13]

III. Interpretation and Effect.

In general.

(779) The court instructs the jury that if they believe from the evidence that plaintiff made the contract alleged in the declaration with the defendant to "shell the defendant's corn," then the jury are instructed that under such contract the plaintiff had no right to keep on shelling no matter whether the corn was fit to shell or not, and if the jury believe from the evidence that after plaintiff commenced shelling defendant's corn, he was repeatedly stopped from work by defendant's orders, on account of the corn not being in a fit condition to ship and that after the plaintiff had discontinued shelling because of the orders of defendant, the defendant had promised to pay plaintiff for time lost during such suspension of work, then the jury are instructed that

[12] Fosdick v. Van Arsdale, 74 Mich. 302.
[13] Harvey v. Tama Co., 53 Iowa, 228.

such promise is not binding for want of consideration, and plaintiff cannot recover upon it.[14]

(780) The court instructs the jury that the main question is whether plaintiff has complied with the terms of the contract on his part to be performed and that it becomes a material inquiry whether according to the terms of the modified or verbal contract for delivery of (barley), the (barley) was to be paid for as each load was delivered or whether it was not to be paid for until the delivery of all the (barley) which was the subject of the sale, and the court instructs the jury that as the modification of the contract of sale was verbal, and the parties differ as to its terms, the question of the construction of the modified contract is a question for the jury to decide.[15]

(781) The court instructs the jury that the principal question in this case is whether the agreement between plaintiff and defendant was that plaintiff was to take in exchange for his farm as part payment from the defendant a debt or obligation which A. was to give the defendant to secure the payment of the purchase money of the property described in the complaint and which was sold by the defendant to A., or whether the plaintiff was to take the property described in the complaint as sold by the defendant to A., and the debt as an incident. If the agreement was that plaintiff was to take the debt or obligation of A., then it became the duty of the defendant as a part of the contract to procure the obligation and deliver it in payment, and if he did not do so, then defendant has failed to perform on his part and plaintiff may maintain this action to recover the amount of the obligation. The jury are further instructed that if the agreement was that defendant was to give to the plaintiff, or transfer to

[14] Belden v. Woodmansee, 81 Ill. 25.

It would not have been proper in this case to have submitted to the jury what the rights of plaintiff were under the contract.

[15] Gardner v. Clark, 17 Barb. (N. Y.) 538.

him, not the property sold by defendant to A., but a demand or debt created or to be created by the purchase by A. from the defendant of the said ———— property, then upon such an agreement the risk of A.'s refusing to carry out his agreement and give the obligation to the defendant was upon the defendant and not upon the plaintiff and plaintiff cannot be prejudiced by A.'s refusing to complete the purchase and give the defendant his debt, unless such refusal was by the plaintiff's interference or procurement.[16]

(782) The court instructs the jury that by the written contract between plaintiff and defendant, read in evidence, the said defendant bound himself, unconditionally, to pay to plaintiff ——— dollars on the —— day of ———, and the jury will find a verdict for the plaintiff for said sum with interest from ———, at —— per cent., unless they further believe from the evidence that the amount so agreed to be paid has been paid, satisfied or released.[17]

(783) The court instructs the jury that the clause in the policy immediately following ——— under the head of "Conditions" should be construed to refer to those provisions and conditions of the policy which enter into and form a part of the contract of insurance, and are essential to make it a binding contract between the parties, and which are conditions material to the risk and not those stipulations which are to be performed after a loss has occurred, such as giving notice and furnishing proof of death.[18]

Interpretation of contract partly in writing.

(784) The court instructs the jury that this is an action by plaintiff against defendant to recover the value of an engine ordered of the plaintiff by the defendant and that there was a writing between the parties consisting of an order by plaintiff for the machinery, which purported to embody some

[16] Thomas v. Dickinson, 23 Barb. (N. Y.) 431.

[17] Edwards v. Smith, 63 Mo. 119.

[18] Approved in Travelers' Ins. Co. v. Harvey, 82 Va. 949.

of the provisions of the contract between plaintiff and the defendant. No parol evidence can be heard to change the agreement so far as the parties have put their agreement into writing, but plaintiff is allowed to show that all stipulations entered into between the parties were not put into the contract and that all the representations which the plaintiff made at the time of entering into the contract of sale were not put into the contract. The order for machinery and the evidence together show that a particular engine was in the minds of both parties. The court instructs the jury that if representations were made by plaintiff to defendant respecting this particular engine which were material and operated to influence the defendant to make the contract of purchase, they must be made good, in the engine which is furnished by the plaintiff as fulfilling the contract of sale, and if any of the representations made by the plaintiff as to the character of the engine were not true substantially, that is, such representations as were material and operated to influence defendant to make the contract of purchase, then defendant would not be under obligations to accept the engine.[19]

(785) The court instructs the jury that this is an action by plaintiff against defendant to recover the value of an engine ordered of plaintiff by the defendant and that there was a writing between the parties consisting of an order by the defendant for machinery and that this order purports to embody at least some of the provisions of the contract between the parties. It is claimed by the defendant that the writing does not embrace all the representations made by plaintiff as to quality, character and kind of engine that was to be furnished, but the jury are instructed that so far as the writing does provide for the kind and character of engine which should be furnished, it must control and nothing in the evidence outside of the contract can stand as against the contract itself; that is so far as the evidence may conflict with

[19] Palmer v. Roath, 86 Mich. 602.

the written provisions of the contract, the writing must control.[20]

Instructions where extrinsic evidence is necessary to aid interpretation.

(786) The court instructs the jury that plaintiff and defendant entered into a contract by which the plaintiff agreed to sell to the defendant his house, farm and premises situated in ———— containing about ———— together with all fixtures belonging to the "fulling mill and carding machine" and if the jury believe from the evidence that there was a building on the farm so sold by plaintiff to defendant which had been used in the wool-carding and cloth-dressing business and that it was called and known, at the date of the contract, as the "fulling mill" or "carding machine," but that the building had not been used for that business for several years prior to the date of the contract of sale of the land described in the declaration to the defendant and that the carding machine itself had been taken from the building, before the contract was made and stored in a grist mill situated upon the farm, then the jury are instructed that it is a question for the jury to determine whether the words "carding machine and fulling-mill" as used in the contract of sale do not mean the building on the farm in which the business of carding wool and dressing cloth had been carried on and if so, whether the phrase "fixtures belonging to the fulling mill and carding machine" does not mean the carding machine in question and other machinery that had been used in said building, though the jury may find that it was detached from said building and housed and stored, in some other place on the farm, at the date of the contract.[21]

Recovery upon oral contract.

(787) The court instructs the jury that this is an action

[20] Palmer v. Roath, 86 Mich. 602.

[21] Martin v. Cope, 3 Abb. Ct. App. Dec. (N. Y.) 182.

upon a contract and that the contract being an oral one, if any contract was made, it is a question for the jury to find what that contract was.[22]

Must abide by terms of contract.

(788) The court instructs the jury that if they believe from the evidence that there was a special contract between plaintiff and defendant, by which plaintiff was to look to a third person for pay for his work, and the parties were legally competent to make a contract, then they must abide by the terms of it, and though the jury may believe from the evidence that the services rendered by plaintiff, operated to the benefit of defendant, this fact does not relieve the parties from the legal effect of their special contract.[23]

Interpretation of phrase "ready for occupancy."

(789) The court instructs the jury that the question of the proper construction and interpretation of a contract is one of law for the court to decide. The alleged contract here sued on provides that the plaintiff shall finish a house for defendant "ready for occupancy" and then proceeds to state the details as to a portion of the work. As far as the manner of doing the work and kind of work is specified, the work must be done as thus specified, and the only difficulty arises as to the work not specified, but which is required to be done by that provision of the contract which says that the house must be finished "ready for occupancy." The court cannot as a matter of law give you the details which the parties have omitted but instructs you that plaintiff would under this provision of the contract be bound to do all things that would be reasonably necessary and proper to make a house ready for occupancy, taking into consideration, in determining what should be done, the character of the house he was to finish; and if the jury find that he omitted anything spec-

[22] Noyes v. Loring, 55 Me. 408.

[23] Noyes v. Loring, 55 Me. 408.

ified in the contract or omitted any other thing that was reasonably required to have such house as is referred to and described in the contract, ready for occupancy, then he has not performed his contract and cannot recover upon it.[24]

Intent or understanding of parties.

(790) The court instructs the jury that if they believe from the evidence that (the plaintiff sold to defendant a specified number of hogs as described and alleged in the declaration, and that from the language used in the contract of sale the plaintiff had a right to consider that he was selling the hogs to the defendant at the defendant's risk as to the moving of said hogs to the defendant's farm, then the jury may find a verdict for the plaintiff for the entire number of hogs sold, though they may further find that defendant understood that plaintiff was to be at the risk of moving the hogs to the defendant's farm, and though they may further find that some of the hogs perished from the heat while being driven to defendant's farm.)[25]

(791) The court instructs the jury that the plaintiff entered into a contract with the defendant for the construction of ———— and plaintiff contends in this suit that he is entitled to more than ————, the amount of money which defendant paid plaintiff for the work done and which defendant claims is all the plaintiff is entitled to and the court instructs the jury that in determining the question whether or not plaintiff acquiesced in the construction of the contract on the part of the defendant by which the defendant paid and plaintiff received ———— dollars per ———— for the material in the ———— in dispute, they are to look to all the circumstances of the case and plaintiff will not be considered as acquiescing in defendant's construction of the contract, unless the plaintiff neglected to assert his own construction thereof, to the defendant or its agents for such

[24] Cunningham v. Washburn, 119 Mass. 224.

[25] Nichols v. Mercer, 44 Ill. 250.

length of time as to warrant the defendant in believing that he had waived or abandoned his right to demand more than ———— dollars per ————.[26]

(792) The court instructs the jury to disregard all the evidence of the construction put upon the contract involved in this suit and given in evidence in this case by C., the agent of the defendant, at the time this contract was entered into, unless the jury believe that the said construction of the contract by C. was communicated by C. to plaintiff and was acquiesced in by him or unless plaintiff put the same construction on said contract at said time, and though the jury may believe from the evidence that immediately prior to and about the time the contract here in suit was written and signed by the plaintiff, the probability was discussed between C. and the plaintiff as to ————, yet such discussion cannot be considered by the jury as sufficient to change, modify, or add to the provisions and terms of said contract, but only for the purpose of ascertaining the circumstances connected with the subject-matter of the contract at the time it was made and the object and purpose of the parties as avowed at the time they entered into the contract.[27]

IV. Performance of Contract.

Necessity of performance by plaintiff.

(793) The jury are instructed by the court that the plaintiff in this case seeks to recover under the agreement made by the defendant, L., dated ————, which has been offered in evidence as "Plaintiff's Exhibit A"; that in order to entitle him to recover it must be shown by the plaintiff, by a preponderance of the evidence, that he has fully and completely carried out and performed all of his obligations in said agreement.[28]

[26] Norfolk & W. R. Co. v. Mills, 91 Va. 613.
[27] Norfolk & W. R. Co. v. Mills, 91 Va. 613.
[28] Approved in Lawrence v. Rhodes, 188 Ill. 96.

Necessity of tender of performance.

(794) The court instructs the jury that it is incumbent on the defendants under the contract alleged in plaintiff's declaration to show an offer to perform, or some sufficient excuse for nonperformance on their part, in order to excuse themselves from liability to pay damages, if the evidence shows that the plaintiffs were ready and willing to perform their part of the contract.[29]

Sufficiency of performance in general.

(795) The court instructs the jury that if they believe from the evidence that plaintiff entered into a contract with the defendant to (dig a well ———— number of feet deep unless the plaintiff should strike water at a less depth, and that the plaintiff made efforts to find water and failed, and that plaintiff did not dig the well to the depth designated by the contract), then the jury are instructed that plaintiff cannot recover for his services.[30]

Same.

Action on subscription.

(796) The court instructs the jury for the defendant, that in regard to the item for the (map) sued on in this case, if the jury find, from the evidence, that the plaintiff, at the time the defendant subscribed for said (map), agreed to insert in the said (map) a business card for the defendant, and as a part of the consideration of said subscription, and that it was agreed that the card should properly describe the place of business of defendant, then, in law, to enable the plaintiff to recover on said item, they must have inserted said business card substantially as agreed upon, and properly described the place of business of the defendant substantially as agreed upon. And if the jury find, from the evidence, that the defendant's place of business was incorrectly described as in another and different part of the city of

[29] Approved in Bird v. Forceman, 62 Ill. 212.

[30] Lawrence v. Van Deventer, 51 N. Y. 676.

——— from where the defendant's place of business actually was, the jury should find for the defendant as to such item, if they further believe the mistake was made by the plaintiffs, and not by the defendant in giving the description of the place of business.[31]

Substituted performance.

(797) The court instructs the jury that one who employs an artist to paint a portrait is entitled to his personal skill, and is not required to accept a painting produced by another.[32]

(798) The court instructs the jury that if they believe from the evidence (that plaintiff contracted with defendant to secure the publication of an advertisement in certain papers published at designated places, and that the advertisement was not published by plaintiff in the newspapers selected at the given locations, but that the advertisement was published in other newspapers at other locations, then plaintiff cannot recover for publishing such advertisements, although the newspapers selected in which plaintiff published the advertisement were a better advertising medium than those designated in the contract).[33]

(799) The court instructs the jury that in order that the contract shall bear the impress of being a personal contract or one which involves personal considerations, something must appear upon it or it must inevitably suggest that a personal confidence or trust was reposed in the person contracted with, and if the jury believe from the evidence (that the plaintiff was employed by the defendant as supercargo and was to be paid certain commissions on the proceeds of the cargo, and that no personal trust was reposed in the plaintiff, and that plaintiff was taken sick and employed others in his place who were to be paid from his own commissions,

[31] Approved in Andreas v. Ketcham, 77 Ill. 377.
[32] Francois v. Ocks, 2 E. D. Smith (N. Y.) 417.
[33] Dauchey v. Drake, 85 N. Y. 407, 9 Daly, 31.

and that the substituted supercargo fully performed the duties which the plaintiff was to perform, then the plaintiff is entitled to the stipulated commissions).[34]

Substantial performance.

(800) The court instructs the jury that plaintiff in this case sues to recover under a contract by which he was to furnish to defendant a monument, the cap of which monument should be the same as that upon a monument erected upon the grave of one T. It appears from the evidence that the monument erected by plaintiff for defendant in this case was a smaller monument than the one erected on the grave of T. The court instructs the jury that to entitle plaintiff to recover, it is not necessary that the cap on the monument in question should be of the exact proportion and size as that upon the T. monument. It is sufficient if it be shown to be substantially the same in style and finish and of such proportions as to present the same general appearance as that upon the monument of T., and so to be of such proportions as to properly correspond with the monument on which it is placed, and if from the evidence, the jury shall find that plaintiff has thus substantially complied with his contract, you will find for plaintiff. If you do not so find, you will find for defendant.[35]

(801) The court instructs the jury that by the terms of the agreement introduced in evidence in this case, the defendant contracted with the plaintiff to have the plaintiff elected a member of the ———— company and a manager of said company within sixty days from the time when the contract was entered into. This contract was based upon a good and sufficient consideration (here state the facts constituting the consideration) and the object and purpose of the contract was to put the plaintiff in a position where he

[34] Gray v. Murray, 3 Johns. Ch. (N. Y.) 167.
[35] Prior v. Schmeiser, 100 Iowa, 299.

could find out all about the company, since as a member and manager he would have the right to investigate all the contracts of the company its books and papers, and he would have something to say in the management and control of the company in that way. The plaintiff was willing to risk his money in the enterprise, if he was put in a position to have something to say in the control and management of the business. Soon after the contract was entered into, the plaintiff took possession of the business of the ———— company and it appears from the evidence that he exercised all the rights of manager, he controlled the entire business of the company, made contracts in its behalf and did everything except ————. The court instructs the jury that it is for them to say, and it is the only question left for their determination in this case, whether plaintiff by his acts or conduct acquiesced in the condition of affairs as they existed and was satisfied with his position, instead of being formally elected a member of the company and a manager; it is for the jury to say from the evidence whether plaintiff was contented with his being allowed to have absolute control of the business, and whether he was anxious that there should be a literal compliance with the terms of the contract. If the plaintiff was satisfied with the condition of affairs, it is too late for him, after the enterprise has failed, to complain that there was not a strict literal compliance with the terms of the contract, in respect to formally electing him a member and manager of said company.[36]

(802) The court instructs the jury that by the terms of the agreement introduced in evidence in this case, the defendant contracted to have the plaintiff elected a member and a manager of the ———— company, within sixty days from the time when the contract was entered into. It appeared from the evidence that plaintiff was not formally elected a member and manager of the company within the prescribed

[36] Chalfant v. Goldbeck, 173 Pa. 354.

sixty days, and at no time afterward. At the expiration of the sixty days, when the plaintiff found that he was not formally elected as a member and manager of the company, he could then have demanded of defendant, a strict, and literal compliance with the contract, he had a right to ask for a return of money which he had paid as consideration of the contract. He could have, at least made complaint of some kind to the defendant that the contract had not been literally carried into effect and could have shown that he considered a literal compliance with the terms of the contract to be of importance. It does not appear from the evidence that plaintiff did any of these things, and it does appear from the evidence that the plaintiff was put in absolute control of the affairs of the ———— company and that he not only managed the business almost exclusively, but that he was the only person connected with it or interested in the business, who received any money out of it, so that in effect plaintiff was placed precisely in the position he would have been in, if there had been a literal compliance with the contract with respect to formally electing him as manager of the company, and it is for the jury to say whether plaintiff waived a strict and literal compliance with the terms of the contract. If the jury shall find from the evidence that plaintiff acquiesced in the performance of the contract by the defendant as above stated and made no protest until after the enterprise failed, and that plaintiff suffered no loss from the failure of defendant to literally comply with the contract with respect to formally electing plaintiff as manager and member of the company, then the jury will find for defendant.[37]

Failure to furnish article on demand.

(803) The court instructs the jury that the defendant was bound by the contract to furnish at the ———.

[37] Chalfant v. Goldbeck, 173 Pa. 354.

The plaintiffs claim that the defendant failed and refused to furnish such ———— and that by reason thereof they were damaged $—— and they claim that they demanded such ——— under the contract of the defendant. If the defendant failed and refused to furnish such ——— and the plaintiffs were damaged thereby, they will be entitled to recover such damages as they have sustained, if they have sustained any on this account.[38]

Performance of agreement not to do business in a certain locality.

(804) The court instructs the jury that if they believe from the evidence that defendant entered into an agreement with the plaintiff on a sufficient consideration, (not to practice medicine or surgery within the limits designated in the declaration, and that the contract entered into between defendant and plaintiff prohibited the compounding of medicine or advising or visiting any person sick or disabled, or performing any act by the laws of the state required to be done by a person qualified to practice medicine or surgery, and if the jury believe from the evidence that the defendant attended with other physicians upon a person *in extremis,* but charged no fee for this service, and that defendant occasionally recommended certain patent medicines to persons coming to a drug store in which he was interested,) the jury are instructed that such acts do not constitute a violation of defendant's agreement.[39]

Action on note payable when railroad shall be completed.

(805) The court instructs the jury that the execution of the written instruments in suit is admitted, and if you find from the evidence that the ——— Railroad was built and completed from ——— to ———, and the cars running thereon to the depot at ———, within —— years from the

[38] Approved in Eaves v. Cherokee Iron Co., 73 Ga. 459.
[39] Greenfield v. Gilman, 140 N. Y. 168, 55 N. Y. St. Rep. 427.

—— day of ——, 19—, then the plaintiff is entitled to recover the full amount named in said instruments, with interest thereon at the rate of —— per cent. per annum from the time the road was thus completed to the present time, unless you find that the defendant has maintained his defense of failure of consideration as hereinafter explained, by a preponderance of testimony.[40]

(806) The court instructs the jury that if they believe from the evidence that the plaintiff company since the execution of the notes in suit has issued a large amount of illegal stock certificates and that such illegal stock certificates are beyond the control of plaintiff company and that the illegal certificates of stock so issued (if the jury find that they were issued) cannot be distinguished from the genuine stock, and that it is now beyond the power of the plaintiff railroad company to deliver to defendant valid stock certificates upon his payment of the notes, then this will constitute a good defense to this action on the note.[41]

(807) The court instructs the jury that this is an action upon a note given by defendant payable when plaintiff shall have constructed its railroad from ——— to ——— and the defense set up in this case is that the plaintiff company issued more certificates of stock than it was authorized by law to do, and the court instructs the jury that if they find from the evidence that plaintiff built its railroad from ——— to ——— within ——— years, and if the illegal stock issued by the plaintiff has been canceled and destroyed and plaintiff is able and willing to deliver genuine stock to the defendant when the defendant shall pay the notes in suit, then the defense is invalid and your verdict must be for plaintiff. To make out his defense, the defendant must show that the illegal stock alleged to have been issued could not be dis-

[40] Approved in Merrill v. Reaver, 50 Iowa, 404.
[41] Merrill v. Reaver, 50 Iowa, 404.

tinguished from the genuine and that the illegal certificates are outstanding.[42]

Joint adventure of purchase and resale of lands.

(808) The court instructs the jury that if they believe from the evidence that the plaintiff and defendant made the contract described in the declaration, by which contract the defendant was to purchase the public lands described in the declaration and the plaintiff was to plat, survey and subdivide the lands so purchased, and the plaintiff was to dispose of the same either at private or public sale for the joint benefit of plaintiff and defendant, and if the jury believe from the evidence that the plaintiff performed the alleged contract on his part by platting and surveying and subdividing the land described in the contract at his own expense, that he advertised and sold a part of the lots with the concurrence of defendant and at plaintiff's own expense and was willing and offered to advertise and sell the balance and could have sold the same, but was prevented by defendant from making a further sale thereof without any just or reasonable excuse, and defendant without such excuse refused to make bonds for deeds to purchasers upon payment and security as provided by the contract between plaintiff and defendant, then the jury will find for plaintiff and assess damages which they may find from the evidence he has sustained by the violation of the contract.[43]

Action on contract to construct water-wheels.

(809) The court instructs the jury that the plaintiff in this case sues on a contract by which plaintiff undertook to construct water-wheels for defendant, which with their appurtenances and fixtures should be able, when employed by defendants in running their mill to work up to 110 horse power; that they should be capable of effecting a saving of

[42] Merrill v. Reaver, 50 Iowa, 404.

[43] Robinson v. Stow, 39 Ill. 568.

20 per cent. of water over the wheel previously in use, and that the wheel should be completed by ————, unless the plaintiffs were prevented from completing the same on or before said ———— by circumstances over which plaintiff had no control, and the court instructs the jury that even if they shall find from the evidence that the wheels as constructed by plaintiff with their appurtenances and fixtures were able to work up to 110 horse power and were capable of effecting a saving of 20 per cent. of water, but shall also find that said work was not completed on or before the ——— day of ——— and that the plaintiffs were not prevented from completing said wheels on or before said day by circumstances over which they had no control, then the defendant is entitled to a credit of ——— dollars for each and every day during which said work remained uncompleted after said ——— day of ———.[44]

Violation of agreement to make loan.

(810) The court instructs the jury that if they believe from the evidence that the plaintiff's farm in ——— county was about to be sold in foreclosure proceedings instituted by one E., who held a mortgage against the plaintiff and that the defendant made a proposition to the plaintiff that if the plaintiff was desirous of saving his farm from being sold under foreclosure proceedings, he, the defendant, would loan and advance to the plaintiff the sum of ———— to pay upon the first or cash payment when the same should be required by the mortgagee and would indorse the plaintiff's note for the deferred payments and would loan and advance to the plaintiff the several sums of money necessary to pay off and take up the said several promissory notes, when they should become payable, and would guaranty to save the plaintiff from loss by reason of such loans and advances until after the said plaintiff could well dispose of such farm

[44] Conner v. Mount Vernon Co., 25 Md. 55.

without loss, and if the jury further believe from the evidence that the defendant made this proposition in consideration that the plaintiff would ———, and if the jury believe from the evidence that the plaintiff agreed to this proposition of defendant and that the plaintiff bought in the said property at the said foreclosure sale and performed his part of the agreement, and that the defendant loaned and advanced to plaintiff the said sum of ———— to pay upon said first or cash payment on said farm and indorsed the promissory note of the plaintiff for the deferred payments and if the jury shall further believe from the evidence that afterwards the defendant refused to loan and advance to plaintiff the balance of the cash payments when demanded by the mortgagee and to loan and advance to plaintiff the several sums necessary to take up the said promissory notes or either of them and that by reason of said refusal of the defendant to so advance the money, if they shall find such refusal, the said farm of plaintiff was resold and said plaintiff thereby suffered loss, if the jury shall so find, then the verdict of the jury must be for plaintiff and for such amount of damages as they shall find from the evidence the plaintiff sustained by reason of said default of said defendant.[45]

Delay in performance.

(811) The court instructs the jury that where one party demands strict performance as to time by another party, he must perform on his part all the conditions requisite in order to enable the other party to perform his part, and that a failure on the part of the party demanding performance to do the preliminary work required in order to enable the other party to complete his part during the time limited, operates as a waiver of the time provision in the contract, and that if the jury believe from the evidence (that plaintiff entered into a contract with the defendant to set up a ——

[45] Horner v. Frazier, 65 Md. 1.

machine within ——— days, and that the defendant agreed to furnish a proper foundation for the structure, and if the jury believe from the evidence that defendant did not furnish the foundation in time so that plaintiff could set up the machine within the time stipulated, then the failure of plaintiff to comply with his agreement within the time specified, will not defeat his right to recover).[46]

Recovery for part performance or imperfect performance of contract.

(812) The court instructs the jury that if they believe from the evidence that plaintiff willfully abandoned the work sued for in this case leaving the house which he contracted with defendant to build not finished according to the contract, then plaintiff cannot recover in this action. But if a party in good faith proceeds under a special contract, doing what he reasonably supposes is required and substantially completes it and the other party accepts the benefit of the work, although the contractor may not have done all that was really his duty or in the exact manner required, still the contractor may maintain an action to recover the value of his labor and materials, but he will not necessarily recover the cost of his materials or the ordinary price of the labor. The party for whom the work is done is entitled to have deducted from the contract price, the difference between the value of the work as done and its value, if it had been done in accordance with the contract.[47]

(813) The court instructs the jury that if they believe from the evidence that there was a special contract between plaintiff and defendant (as for instance in relation to quarrying stone) and that the contract was not performed by either party, yet if plaintiff eventually delivered some stone to defendant and the defendant accepted and appropriated the same to his own use, plaintiff is entitled to recover the con-

[46] Dannat v. Fuller, 120 N. Y. 554, 31 N. Y. St. Rep. 825.

[47] Approved in Cunningham v. Washburn, 119 Mass. 224.

tract price of the stone and deduct therefrom any damages sustained by the defendant through failure of plaintiff to deliver the same according to the contract and any payment made on the same.[48]

Same—Recovery for work and labor.

(814) The court instructs the jury that if they believe from the evidence, that the defendant employed the plaintiffs to thresh his ——— for —— dollars per ———, then they, the plaintiffs, were bound in law to do it in a workman-like manner. And should the jury further believe, from the evidence, that the plaintiffs, through negligence, want of care or skill, performed such threshing in a wasteful, slovenly manner, whereby the defendant was damaged in an amount equal to or greater than the sum claimed for the threshing, then the law is for the defendant, and the jury should so find.[49]

(815) The court instructs the jury that if they should believe, from the evidence, that the plaintiffs were the owners of a ——— machine, which they ran about the county for hire, and that the defendant employed them to thresh his ——— seed at —— dollars per bushel, and that they, the plaintiffs, knowingly undertook and performed said threshing with a machine, defective and out of repair, either in the huller or otherwise, whereby the defendant was damaged in an amount equal to or greater than the sum claimed for the threshing then the law is for the defendant, and the jury should so find.[50]

Waiver of rights under contract.

(816) The court instructs the jury that a person may waive a right which has arisen under a contract, and in this case, the plaintiff could, if he chose, waive benefits accruing

[48] McClelland v. Snider, 18 Ill. 58.
[49] Approved in Garfield v. Huls, 54 Ill. 427.
[50] Approved in Garfield v. Huls, 54 Ill. 427.

to him or the rights accruing in his favor out of the original contract with the defendant and so release the defendant from the performance of the original contract, but if the defendant comes into court relying upon the defense of waiver, the defendant is bound to establish the facts necessary to show the truth of the defense and the defendant is bound to prove by a preponderance of the evidence that the plaintiff has waived his rights and benefits accruing to him under the contract and has released the defendant from performance of the contract. If the defendant has offered evidence satisfactory to your mind, of a waiver of the original contract by the plaintiff, it constitutes a good defense to plaintiff's recovery in this case, but the plaintiff is not bound to show anything with reference to the matter of waiver, unless in reply to something which the defendant may show as going to establish the waiver.[51]

(817) The court instructs the jury that plaintiff entered into a contract with defendant for the construction of ——— and that the plaintiff claims that he has not received all the money to which he is entitled under the contract for work done by him, and the court instructs the jury that if they believe from the evidence, that plaintiff received from the defendant company compensation for ——— at the rate of ——— and that at the time of receiving such payments from the defendant, he was told by defendant's agent that the defendant would adjust everything to the plaintiff's satisfaction, if anything more was due to plaintiff for the work done by him, and that plaintiff relied upon his ability to adjust the matter satisfactorily with the defendant and that plaintiff had the right reasonably to so rely, then the acceptance of such payment is not to be taken as a waiver of plaintiff's rights under the contract or as acquiescing in the construction placed upon the contract by the defendant, and the jury

[51] Williamson v. Eastern Building & Loan Ass'n of Syracuse, N. Y., 62 S. C. 390.

must determine from all the facts and circumstances of the case whether plaintiff has by his conduct waived any of the rights under said contract or has acquiesced in the construction placed upon the contract by the defendant.[52]

Waiver of breach.

(818) Although you may believe from the evidence that plaintiffs did sublet a portion of the work and that a part of the work sued for was done by subcontractors under such subletting, yet, if such subletting was done with the knowledge and consent of the defendant by his express promise to hasten the work, the plaintiffs are entitled to recover for all work done under said contract, so far as any defense is concerned, based upon the fact of such subletting, and especially if the plaintiffs were to and did give the work their personal attention and oversight; and whether the defendant assented to such subletting or not, should be determined from all the evidence, facts and circumstances in the case, and you are the sole judges of the evidence and credibility of the witness, and may give to each such credit as you may deem proper.[53]

Waiver of delay in performance.

(819) The court instructs the jury that although where by the terms of a contract time is made of the essence, the failure of the contractor to complete the work within the time limited will defeat his right to recover anything under the agreement, yet if the jury believe from the evidence (that plaintiff entered into a contract with defendant to excavate on the property described in the declaration, time to be of the essence, and that the plaintiff did not finish the excavation within the time specified, but defendant permitted plaintiff to continue and finish the work after the time stipulated, then defendant cannot insist upon the delay as a defense to this suit to recover the price of the work).[54]

[52] Norfolk & W. R. Co. v. Mills, 91 Va. 613.

[53] Approved in Bean v. Miller, 69 Mo. 384.

[54] Dunn v. Steubing, 120 N. Y. 232, 30 N. Y. St. Rep. 653.

Acceptance of performance.

(820) The court instructs the jury that if they should believe from the evidence that the defendant employed plaintiffs to thresh his ——— and that the defendant accepted the work as done by the plaintiffs, without having an opportunity of inspection and made no complaint at the time, yet the defendant may show the actual condition or the defects of plaintiff's machine, and carelessness of the plaintiffs; and if the jury are satisfied, from the evidence, that the defendant was injured or damaged, and such damage was the result of defective machinery, or a careless manner of working such machine, the jury may deduct the amount of such damage from the value of the threshing, as fixed by the parties.[55]

Excuse for nonperformance.

(821) The court instructs the jury that when a person makes a contract to do a thing that is possible to be done, he will be liable for a breach of such contract, notwithstanding it was beyond his power to perform it.[56]

(822) The court instructs the jury as a matter of law, that where two parties enter into a lawful contract upon sufficient consideration, and one of the parties is ready and willing to perform, and makes preparations to perform on his part, but is prevented from performing by the other party, the party so ready and willing to perform can recover all damages suffered by him by reason of the default of the other party, including necessary expenses incurred in making such preparation.[57]

Action by contractor for work done in clearing right of way.

(823) Under the contract it was not the duty of the plaintiffs to procure the right of way; and if you find from

[55] Approved in Garfield v. Huls, 54 Ill. 427.

[56] Kenwood Bridge Co. v. Dunderdale, 50 Ill. App. 581.

[57] Approved in Kenwood Bridge Co. v. Dunderdale, 50 Ill. App. 581.

the evidence that the plaintiffs entered upon the performance of their part of the contract by grubbing, clearing, grading, etc., as therein stipulated, and that they were prevented from completing their part of the contract because the right of way had not been obtained from the owners of the land through which the road ran, and where the work was to be done, who forbade and refused to permit the plaintiffs to enter and do the work, this would be a sufficient excuse for the failure of the plaintiffs to perform the work, where such right of way had not been obtained.[58]

Same—Breach of contract by other party.

(824) If you believe from the evidence that the plaintiffs entered upon the performance of their part of the said contract and performed work under it, according to its terms, and if you further find that the ——— made out monthly proximate estimates of the work done by plaintiff at the end of each month which were returned and brought to the notice of the defendant, and that the defendant, upon the request of the plaintiffs, after the expiration of ——— days from the return of any such estimate refused and neglected to pay plaintiffs the amount due according to the amount in such estimate, such failure or refusal of the defendant to pay was a breach of his part of the contract, and the plaintiffs were not bound to go on and complete all the work, but might suspend or quit the work until payment was made, and if you find that payment has not been made and the work has been suspended, the plaintiffs will be entitled to recover in this suit for all work done under said contract at the rates therein stipulated.[59]

Burden of proof.

(825) The court instructs the jury that to entitle the plaintiff to recover in this action the burden of proof is upon

[58] Approved in Bean v. Miller, 69 Mo. 384.
[59] Approved in Bean v. Miller, 69 Mo. 384.

him to show to the satisfaction of the jury the existence of the contract sued on and also such a breach thereof as entailed loss upon the plaintiff.[60]

(826) The court instructs the jury that by the terms of the contract offered in evidence the plaintiffs cannot recover, unless the jury shall find from all the evidence in the case that the ——— constructed by the plaintiffs with their appurtenances and fixtures as arranged by the plaintiffs were able when employed by defendants in running and driving their ——— to work up to ——— horse power, with a full head of water and were capable of effecting a saving of ——— per cent. of water over the ——— wheel that was previously in use and that the burden of proof is on the plaintiffs to establish said facts.[61]

V. Modification of Contract.

In general.

(827) The court instructs the jury that if they believe from the evidence that the defendant made the contract for the sale of ——— to the plaintiff as alleged in the declaration and that the letter of plaintiff offered in evidence was not designed by plaintiff or understood by defendant as varying or changing the terms of such alleged contract of sale, nor as giving defendant the license to decline its performance, it did not discharge the defendant from its fulfillment, and both are still bound by the contract of sale, and if the jury find that such contract was made, such letter will in that case constitute no defense to this action, and if the jury believe from the evidence that the terms of the letter offered in evidence did indicate a proposed change in the terms of the contract of sale, but that the defendant made no reply to such letter, either verbally or by letter, such act and conduct on the part of defendant is proper evidence to

[60] Approved in Burt v. Myer, 71 Md. 467.

[61] Approved in Conner v. Mount Vernon Co., 25 Md. 55.

be considered by the jury as tending to show that the proposition of the letter was not objected to by the defendant, and if it was acquiesced in by the defendant, whether the terms of payment mentioned in the letter were a part of the original bargain or not, the defendant was not thereby released from the contract of sale, if the jury find from the evidence that the contract of sale was made.[62]

(828) The court instructs the jury that if they believe from the evidence that the defendant on ——— agreed to pay to the plaintiff the sum of ——— per year as rental for the premises described in the declaration, but that subsequently plaintiff told defendant that he might occupy the property in question for a fair or reasonable rent for the year from ——— to ——— and defendant consented thereto, then defendant is not liable to pay the sum of ——— which it is alleged he had previously agreed to pay, if the rent of the premises described in the declaration was not reasonably worth the sum so agreed to be paid for said year.[63]

(829) The court instructs the jury that if they believe from the evidence that the arrangement was simply for a postponement of the execution of the contract, and the execution of the contract, under the terms of the postponement, might have been accomplished within one year from its date by its terms, the plaintiff cannot, in this action, recover because in that case, the contract which he has made, which is made by the subsequent agreement, is a different contract from that upon which he declares and seeks to recover at your hands. If, upon the other hand, the contract, by its terms, by the terms of the oral agreement between the parties, the contract alleged to have been made could not be performed within one year from the date of the oral agreement in relation to it, it would not be good

[62] Chichester v. Whiteleather, 51 Ill. 259.

[63] Price v. Pittsburg, Ft. W. & C. R. Co., 34 Ill. 13.

as a contract. It might be treated by the parties as a waiver of the right upon either side to insist upon the immediate performance of the contract, but it would not be good as a contract to take the place of the original contract.[64]

CHAPTER XXXVIII.

CONVERSION.

What constitutes conversion, 830-834.

What constitutes conversion.

(830) The court instructs the jury that if they believe from the evidence, that the ——— in controversy was the property of the plaintiffs, and that the defendants had the possession of it, and that the plaintiffs, by their duly-authorized agent, demanded the ——— of the defendants, and that the defendants refused wrongfully (that is, without right) to deliver the same, this is evidence of a conversion, by the defendants, of the ——— to their own use.[1]

(831) The court instructs the jury that if they believe from the evidence, that the defendants took the ——— from the store formerly occupied by K., without any authority from the plaintiffs or from K. so to do, and then undertook to keep the same from the plaintiffs, as security for a debt which K. owed them, after a demand by the plaintiffs for the same, then they are guilty of a conversion of the ———, if the same belonged to the plaintiffs.[2]

(832) The court instructs the jury that if they believe, from the evidence, that the defendants refused to deliver up the goods, unless an amount larger than what they were entitled to should be paid them, and so told the plaintiff

[64] Barton v. Gray, 57 Mich. 622.
[1] Hale v. Barrett, 26 Ill. 195.
[2] Hale v. Barrett, 26 Ill. 195.

or his agent, then no tender was necessary, if the plaintiffs were ready and offered to pay the amount actually due, as the law does not require a party to do a useless thing.[3]

(833) The court instructs the jury that if defendant was called upon by plaintiff to surrender plaintiff's goods which were then in defendant's possession, and if defendant had received possession of such goods as bailee from a third person, and defendant did not dispute plaintiff's right to the goods, nor set up a claim to them against the plaintiff, but merely declined to turn them over to plaintiff until defendant first had an opportunity of inquiring into the true ownership, or until plaintiff should produce an order from the bailee, then defendant committed no conversion. If, however, defendant's refusal to surrender the goods was evasive, or if his delay in turning over the goods was not made in good faith, then the plaintiff will recover.[4]

(834) The court instructs the jury that if they believe, that when the plaintiff called upon the defendant for the corn that was to have been received by the plaintiff upon the contract, and the defendant pointed to a crib, and said, "There is your corn, take it," and thereupon the plaintiff, after consulting with the witness D., as to whether, in his opinion, there was three hundred bushels, as the contract, if proved, was that the plaintiff was to receive, and upon the witness giving his opinion there was, he went without objection and took two loads of the corn, which was not measured by the parties, and M. was not even present, and that afterwards, when the plaintiff came for the balance, the defendant would not let him have it, that then the defendant is guilty of a conversion of the balance of the corn, unless the jury believe it was the intention of the parties that the corn was not, by their acts, to be the property of the plaintiff.[5]

[3] Hale v. Barrett, 26 Ill. 195.
[4] Carol v. Mix, 51 Barb. 212.
[5] Approved in May v. Tallman, 20 Ill. 443.

CHAPTER XXXIX.

CORPORATIONS.

Action on subscription, 835, 836.
Same—Defense of illegal increase of capital stock, 837, 838.

Action on subscriptions.

(835) The court instructs the jury that if they find that the defendant subscribed to ten shares of the stock of the ——— Company and paid $——— thereon, still if they further find that said subscription was made upon the terms and conditions contained in the prospectus, offered in evidence, and upon the faith of representations contained therein and verbally made to him by a certain ———, a director of said company, as to facts of a nature to induce said subscription, and shall further find that said representations were false and fraudulent as to said facts, and that the defendant learned of the fraudulent nature of said representations and prospectus, and within a reasonable time thereafter, and while the company was still a going concern, notified said company, that he would make no further payments upon his subscription, then their verdict should be for the defendant, unless they shall further find that the defendant failed to exercise reasonable diligence, under all the circumstances of the case, in ascertaining the fraudulent nature of said representations or that he failed to finally repudiate his said contract after acquiring knowledge of said fraudulent representations.[1]

(836) The court instructs the jury that if they shall find from the evidence that the ——— Company was a corporation formed on or about ———, 19—, and that the defendant subscribed to 10 shares of the capital stock of the

[1] Approved in Urner v. Sollenberger, 89 Md. 316.

said company, payable, except as to the first 20 per cent. thereof, at such times as the board of directors might prescribe, and that more than $——— of the common stock of such company was subscribed for, and that on or about the ——— day of ———, 19—, the board of directors of the said company by resolution called for the payment of 20 per cent. of the amount of said subscription payable on the ——— day of ———, 19—, and that notice of said call was promptly made to said defendant, addressed to his address in ——— and that subsequently the ——— Company executed the deed of trust offered in evidence to ———, trustee, and shall further find that the defendant executed the proxy dated the ——— day of ———, 19—, and offered in evidence, then the plaintiff is entitled to recover, even though the jury shall further find that the defendant was induced to make his subscription by the fraudulent representations of the promoters and agents of the ——— Company, offered in evidence.[2]

Same—Defense of illegal increaseof capital stock.

(837) The court instructs the jury that if they shall believe from the evidence that at the time the defendant signed the subscription paper, the capital of the plaintiff was to be but $50,000, and that it was then so written in such paper, and the same was at any time afterwards changed by an interlineation so as to make it read $150,000 and that defendant did not know of such change and never assented to the same, then the defendant cannot be required to pay the same and is exonerated from his subscription and the verdict is to be found for him.[3]

(838) The court instructs the jury that under the articles of incorporation the board of directors had no power to increase the capital stock of the company; at least they

[2] Approved in Urner v. Sollenberger, 89 Md. 316.

[3] Approved in Hughes v. Antietam Mfg. Co. of Washington Co., 34 Md. 316.

had no such power at a meeting of which there had been no notice given, and at which all of the directors were not present. Therefore, if you find that no notice was given of the meeting of directors of ———, 19—, and all of the directors were not present at such meeting, then their action in attempting to increase the capital stock of the company was invalid, and consequently the stock issued in excess of the original capital stock of the company was illegally issued, and was invalid.[4]

CHAPTER XL.

COUNTIES.

Liability for negligence of agents or servants, 839, 840.
Liability for injuries caused by the carrying away of bridge, 841-843.
Enforcement of claim against, 844.

Liability for negligence of agents or servants.

(839) The court instructs the jury that there is no law authorizing a recovery, by a private individual in a suit against a county, for injuries committed by the servants of the county. While railroads and other private corporations are liable for the negligence of their servants, a county is not so liable.[1]

(840) The court instructs the jury, for defendant, that no action by a private individual against the county can be maintained for injuries resulting from the careless or negligent conduct of any agent of the county; and in this case, though the jury should believe, from the evidence, that the property of plaintiff was burned by fire, originating on the poor-farm, carelessly left by the agent or agents of the

[4] Approved in Merrill v. Reaver, 50 Iowa, 404.
[1] Symonds v. Board of Supervisors of Clay Co., 71 Ill. 355.

defendant, yet such facts do not establish the liability of the defendant.[2]

Liability for injuries caused by the carrying away of bridge.

(841) The court instructs the jury that if they find that on the ——— day of ———, 19—, the plaintiffs were the owners of the property situated on ——— Creek, described in ——— offered in evidence, with buildings and mill-dam as part thereof, and which has existed for over ——— years, and that up to the year ——— the stream was crossed by the county road at a ford below the dam, and that about that year the defendants changed the location of the county road so as to cross the stream by an iron bridge set upon abutments connected by wing walls with the banks on either side of the stream, and if the jury shall believe from the evidence that said abutments or either of them were improperly and insecurely erected for the purposes for which they were designed, and that in building said abutments they were not built as high, or with such space between as was reasonably necessary in times of freshet, and that owing to such defective construction (if they find such) or insufficient space provided for venting the water one of said abutments gave way and the bridge was carried off on the ——— of ———, 19—, and was lodged upon the plaintiffs' mill-dam, and that thereby said mill-dam was washed out and injuries sustained by the said mill and by the washing away of their buildings, then the plaintiffs are entitled to recover the losses occasioned thereby and sustained by them in the destruction of their property and business, notwithstanding the jury may be of the opinion that the water, at the time was higher than usual in times of freshet.[3]

(842) The court instructs the jury that even if they find that the flood which carried away the bridge was of

[2] Symonds v. Board of Supervisors of Clay Co., 71 Ill. 355.

[3] Approved in County Com'rs of Hartford Co. v. Wise, 71 Md. 43.

unusual or unprecedented height, still if they further find that but for the improper and negligent construction or condition of the bridge, if they so find, the disaster would not have occurred, then the unusual or unprecedented height of the flood is no defense.[4]

(843) The court instructs the jury that if they find that the bridge above ——— was carried away by a flood on the ——— day of ———, 19—, and in passing down the stream carried away plaintiffs' dam, then plaintiffs are entitled to recover such sum as will compensate them for the injury sustained and loss suffered, provided the jury also find that the location, construction or condition of the bridge was negligent, and that the carrying away of the bridge was in consequence of such location, construction or condition.[5]

Enforcement of claims against.

(844) The court instructs the jury that under our statute before any action can be brought against any county upon an unliquidated demand the same must have been presented to the board of supervisors of such county and payment demanded. In the case at bar the claim is an unliquidated claim, and there being no evidence showing or tending to show that the claim was presented to the board of supervisors of the county of ——— before the commencement of this suit and payment demanded, you are directed to return a verdict for the defendant.[6]

[4] Approved in County Com'rs of Hartford Co. v. Wise, 71 Md. 43.
[5] Approved in County Com'rs of Hartford Co. v. Wise, 71 Md. 43.
[6] Approved in County of Cerro Gordo v. County of Wright, 50 Iowa, 439.

CHAPTER XLI.

CRIMINAL LAW.[1]

I. Presumption of Innocence and Degree of Proof.

Presumption of innocence, 845.
Evidence to be reconciled with innocence if possible, 846.
Reasonable doubt—In general, 847.
Substantial doubt,—not a mere possibility, 848.
Doubt as between two persons, 849.
A doubt for which a reason can be given, 850.
A doubt which would cause a reasonable man to hesitate, 851.
Negative definition, 852.
Doubt as to degree of offense, 853.

II. Evidentiary Presumptions.

Absence of motive, 854.
Flight, 855-858.
Failure to produce evidence, 859.

III. Circumstantial Evidence.

Weight and sufficiency in general, 860, 861.
Every hypothesis of innocence to be excluded, 862-865.
Each link in chain of circumstances to be established, 866.

IV. Credibility of Witnesses and Probative Effect of Evidence.

Considerations in determining credibility, 867, 868.
Effect of willfully false testimony, 869.
Effect of impeachment, 870, 871.
Credibility of informers and detectives, 872.
Effect of discrepancies and contradictions, 873.

V. Credibility of Defendant.

Not to be disbelieved because he is defendant, 874.
Interest in event to be considered, 875, 876.

VI. Credibility of Accomplice.

Evidence to be received with great caution, 877.
Nature of corroboration required, 878.

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[1] See titles of particular crimes for forms of instructions peculiar thereto.

VII. Insanity and Intoxication.
What constitutes—Irresistible impulse, 879.
Frenzy—Intoxication, 880.

VIII. Character Evidence.
Cannot prevail against clear proof of guilt, 881, 882.

IX. Alibi.
In general, 883.
Reasonable doubt on whole evidence, 884.
Reasonable doubt raised by evidence of alibi, 885.

X. Admissions and Confessions.
Weight to which entitled, 886, 887.
Admissions to be taken as a whole, 888, 889.

I. Presumption of Innocence and Degree of Proof.[2]

Presumption of innocence.

(845) The jury are instructed that the defendant at the outset of the trial is presumed to be an innocent man. He is not required to prove himself innocent or to put in any evidence at all upon that subject. In considering the testimony in the case you must look at that testimony and view it in the light of that presumption which the law clothes the defendant with, that he is innocent, and it is a presumption that abides with him throughout the trial of the case until the evidence convinces you to the contrary beyond all reasonable doubt.[3]

Evidence to be reconciled with innocence if possible.

(846) The jury are instructed that the defendant must be presumed to be innocent until his guilt is fully established by legal evidence. The presumption of innocence prevails throughout the trial and it is the duty of the jury, if possible, to reconcile the evidence with this presumption.[4]

[2] See volume 1, chap. XXVIII, for discussion of instructions on this subject.

[3] Approved in People v. Arlington, 131 Cal. 231.

[4] Castle v. State, 75 Ind. 146.

Reasonable doubt—In general.

(847) Then, what is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there be reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty,—a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt; because if the law should go further than this, and require absolute certainty, as it mostly depends upon considerations of a moral nature, it would exclude circumstantial evidence altogether.[5]

Substantial doubt,—not a mere possibility.

(848) The court instructs the jury that before they can convict the defendant that they must be satisfied of his guilt, beyond a reasonable doubt; such doubt to authorize an acquittal upon reasonable doubt alone, must be a substantial doubt of the defendant's guilt with a view to all the evidence

[5] Com. v. Webster, 5 Cush. 295.

in the case and not a mere possibility of the defendant's innocence.[6]

Doubt as between two persons.

(849) That when two persons had the same opportunity to commit the offense, and if upon the whole evidence in the case there remains a reasonable doubt as to which of the two committed it, then neither of the two can be convicted.[7]

A doubt for which a reason can be given.

(850) The jury are instructed that the doubt which will entitle defendant to an acquittal must be a reasonable doubt, not a conjured-up doubt, such a doubt as you might conjure up to acquit a friend, but a doubt that you could give a reason for.[8]

A doubt which would cause a reasonable man to hesitate.

(851) The jury are instructed that a reasonable doubt is such a doubt as exists in the mind of a reasonable man after a full, free and careful examination and comparison of all the evidence. It must be such a doubt as would cause a careful, considerate and prudent man to pause and consider before acting in the grave and most important affairs of life.[9]

Negative definition.

(852) A reasonable doubt is not a possible doubt, not a conjectural doubt, not an imaginary doubt, not a doubt of the absolute certainty of the guilt of the accused, because everything relating to human affairs and depending upon moral evidence is open to conjectural or imaginary doubt, and because absolute certainty is not required by law.[10]

Doubt as to degree of offense.

(853) If the jury believe from all the evidence in the

[6] Approved in State v. Darrah, 152 Mo. 522.
[7] Approved in Vaughan v. Com., 85 Va. 671.
[8] Approved in Vann v. State, 83 Ga. 44.
[9] Approved in State v. Crockett, 65 Pac. 447.
[10] Dunn v. People, 109 Ill. 635.

case beyond a reasonable doubt that the defendant is guilty of murder, but have a doubt as to the degree of offense of which the defendant is guilty, whether it is murder in the first degree, murder in the second degree or manslaughter, the jury will give defendant the benefit of such doubt and find him guilty only of the lowest offense as to which they are in doubt.[11]

II. Evidentiary Presumptions.[12]

Absence of motive.

(854) The court instructs the jury that the absence of all evidence of an inducing cause or motive to commit the crime, when the fact is in reasonable doubt as to who committed it, affords a strong presumption of innocence.[13]

Flight.

(855) The court instructs the jury that if they believe from the evidence that defendant, after he was charged with the crime alleged in the indictment, fled from justice, or while under recognizance forfeited the same on account of said charge, such conduct on the part of defendant is evidence to be considered by the jury in determining his guilt or innocence.[14]

(856) The court instructs that if the jury find from the evidence that defendant at or about the time the charge contained in the indictment was preferred against him fled to a distant place and that such flight was induced by the charge they may consider the same in determining the guilt or innocence of defendant.[15]

[11] Approved in State v. Anderson, 86 Mo. 309.

[12] See volume 1, chap. XXX, for discussion of instructions on this subject.

[13] Approved in Vaughan v. Com., 85 Va. 671.

[14] Approved in State v. Hayes, 78 Mo. 307.

[15] State v. Thomas, 58 Kan. 805. An instruction that flight "is evidence of guilt" is error. Fox v. People, 95 Ill. 71. Any circumstances explanatory of the flight which the evidence may show should be incorporated. State v. Fairlamb, 121 Mo. 137.

(857) The flight of a person immediately after a crime is committed with which he is charged is a circumstance in establishing his guilt; not sufficient in itself to establish guilt but a circumstance which the jury may consider. The weight to which that circumstance is entitled is a matter for the jury to decide in connection with all the facts shown in the case.[16]

(858) The jury are instructed that the flight of a person immediately after a crime is committed with which he is charged is a circumstance in establishing his guilt, not sufficient of itself to establish guilt, but a circumstance which the jury may consider. The weight to which that circumstance is entitled is a matter for the jury to determine in connection with all the facts in the case.[17]

Failure to produce evidence.

(859) The jury are instructed that where evidence which would rebut or explain certain facts and circumstances of a grave and suspicious nature is peculiarly within the defendant's knowledge and right, and he makes no effort to procure it, the jury may properly take such fact into consideration in determining the defendant's guilt or innocence, but no inference of guilt is to be drawn from the omission of the defendant to testify.[18]

III. Circumstantial Evidence.[19]

Weight and sufficiency in general.

(860) The jury are instructed that circumstantial evidence is to be regarded by the jury in all cases, and is many times quite as conclusive in its convincing power as direct and positive evidence. When it is strong and satisfactory, the jury should so consider it, neither enlarging nor belittling

[16] People v. Forsythe, 65 Cal. 102.

[17] Approved in People v. Forsythe, 65 Cal. 101.

[18] State v. Grebe, 17 Kan. 458.

[19] See volume 1, chap. XXIX, for discussion of instructions on this subject.

its force. It should have its just and fair weight with you; and if when it is taken as a whole, and fairly and candidly weighed it convinces the guarded judgment, you should convict, and on such conviction you are not to fancy situations or circumstances which do not appear in the evidence, but you are to make those just and reasonable inferences from circumstances proven which the guarded judgment of a reasonable man would ordinarily make under like circumstances. And if in connection with the other evidence before you, you then have no reasonable doubt as to the defendant's guilt, you should convict him, but if you then entertain such doubt you should acquit him.[20]

(861) To warrant a conviction on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proven by competent evidence beyond a reasonable doubt, and all the facts necessary to such conclusion must be consistent with each other and with the main fact sought to be proved; and the circumstances taken together must be of a conclusive nature, leading on the whole to a satisfactory conclusion and producing a reasonable and moral certainty that the accused and no other person committed the offense charged. The mere union of a limited number of independent circumstances, each of an imperfect and inconclusive character will not justify a conviction, they must be such as to generate and to justify full belief according to the standard rule of certainty. It is not sufficient that they coincide with and render probable the guilt of the accused, but they must exclude every other reasonable hypothesis. No other conclusion but that of the guilt of the accused must fairly and reasonably grow out of the evidence, but the facts must be absolutely incompatible with innocence, incapable of explanation upon any other reasonable hypothesis than that of guilt.[21]

[20] Approved in State v. Seymour, 94 Iowa, 699.

[21] Villereal v. State, 61 S. W. 715.

Every hypothesis of innocence to be excluded.

(862) The court further instructs the jury that circumstances of suspicion, no matter how grave or strong, are not proof of guilt, and the accused must be found not guilty unless the fact of his guilt is proven beyond every reasonable doubt to the actual exclusion of every reasonable hypothesis of his innocence consistent with the fact proven.[22]

(863) The jury are instructed that to warrant a conviction, each fact necessary to establish the guilt of the accused must be proven by competent evidence beyond a reasonable doubt, and the facts and circumstances proven should not only be consistent with the guilt of the accused, but inconsistent with any other reasonable hypothesis or conclusion than that of guilt to produce in your minds a reasonable and moral certainty that the accused committed the offense.[23]

(864) The jury are instructed that to warrant a conviction the circumstances must be proved to your entire satisfaction, and when the circumstances are established, they must point conclusively to the person charged and must be inconsistent with any other reasonable hypothesis.[24]

(865) The jury are instructed that in order to convict the defendant upon circumstantial evidence, it is necessary not only that all the circumstances concur to show that he committed the crime charged, but that they are inconsistent with any other reasonable conclusion. It is not sufficient that the circumstances proven coincide with, account for, and render probable the hypothesis sought to be established by the prosecution, but they must exclude, to a moral certainty, every other hypothesis but the single one of guilt, or the jury must find the defendant not guilty.[25]

[22] Approved in Henderson v. Com., 98 Va. 794.
[23] Chitister v. State, 36 Tex. Cr. App. 635.
[24] Approved in State v. Milling, 35 S. C. 16.
[25] Approved in People v. Anthony, 56 Cal. 397.

Each link in chain of circumstances to be established.

(866) The jury are instructed that each circumstance, essential to the conclusion of the defendant's guilt should be fully established in the same manner and to the same extent as if the whole issue rested upon it. You must be satisfied that each link in the chain of circumstances, essential to the conclusion sought to be established by the prosecution has been fully proven beyond a reasonable doubt and to your entire satisfaction, otherwise you must acquit.[26]

IV. Credibility of Witnesses and Probative Effect of Evidence.[27]

Considerations in determining credibility.

(867) The jury are instructed that they have a right to consider the circumstance and condition of any witness as proven to have been at the time of the incidents about which said witness testifies. They may consider such condition of any witness as to soberness and the surroundings of such witness in determining whether or not such witness was in a condition to see and understand what was occurring.[28]

(868) The court instructs the jury that the jury are the sole judges of the credibility of witnesses and the weight and value to be given to their testimony. In determining as to the credit you will give to a witness, and the weight and value you will attach to a witness' testimony, you should take into consideration the conduct and the appearance of the witness upon the stand; the interest of the witness, if any, in the result of the trial; the motives of the witness in testifying, the witness' relation to or feeling for or against the defendant, or the alleged injured party; the probability or the improbability of the witness' statements, the opportunity the witness had to observe and to be informed as to matters re-

[26] People v. Ah Chung, 55 Cal. 398. The authorities are conflicting as to the correctness of this rule; see volume 1, §§ 319, 320.

[27] See volume 1, chapter XXV, for discussion of instructions on this subject.

[28] Approved in Wheeler v. State, 112 Ga. 43.

specting which such witness gives testimony, and the inclination of the witness to speak the truth or otherwise as to matters within the knowledge of such witness. All these matters being taken into account, with all the other facts and circumstances given in evidence, it is your province to give to each witness such credit and the testimony of each witness such value and weight as you deem proper.[29]

Effect of willfully false testimony.

(869) If the jury believe from the evidence that any witness who has testified in this case has knowingly and willfully testified falsely to any material facts they may disregard the whole testimony of such witness, or they may give such weight to the evidence of such witness on other points as they may think it entitled to. The jury are the exclusive judges of the weight of the testimony.[30]

Effect of impeachment.

(870) The jury are instructed that where it is shown that the reputation of the defendant for truth is bad, his evidence is not necessarily destroyed, but it is to be considered under all the circumstances described in the evidence, and given such weight as the jury believe it entitled to, and to be disregarded if they believe it entitled to no weight.[31]

(871) The jury are instructed that if they believe from the evidence that any witness has been successfully impeached, if by reason of bad reputation for truth and veracity or by reason of statements made out of court conflicting with statements made on the witness stand, or if they find that any witness has willfully sworn falsely in regard to any matter or thing material to the issues in the case, they will be justified in disregarding the whole testimony of such witness, except in so far as they may find corroborated by other credible

[29] Approved in State v. Darrah, 152 Mo. 522.
[30] Approved in State v. Thompson, 21 W. Va. 746.
[31] Approved in State v. Muller, 53 Iowa, 210.

evidence in the case, or by facts and circumstances proved on the trial.[32]

Credibility of informers and detectives.

(872) The jury are instructed that greater care should be exercised in weighing the testimony of informers, detectives and other persons specially employed to hunt up evidence against the defendant, than in the case of witnesses who are wholly disinterested.[33]

Effect of discrepancies and contradictions.

(873) The court instructs that partial variances in the testimony of different witnesses, on minute and collateral points, are of little importance, unless they be of too prominent and striking a nature to be ascribed to mere inadvertence, inattention, or defect of memory; that it so rarely happens that witnesses of the same transaction, perfectly and entirely agree on all points connected with it, that an entire and complete coincidence, in every particular, so far from strengthening their credit, not unfrequently engenders a suspicion of practice and concert; and that in determining upon the credence to be given to testimony, by the jury, the real question must always be, whether the points of variance and discrepancy be of so strong and decisive a nature as to render it impossible, or at least difficult, to attribute them to the ordinary sources of such variance, viz., inattention or want of memory.[34]

V. Credibility of Defendant.[35]

Not to be disbelieved because he is defendant.

(874) The jury are instructed that the defendant is a competent witness on his own behalf, and the fact that he is

[32] Approved in State v. Ormiston, 66 Iowa, 143.

[33] Approved in Sandage v. State (Neb.) 85 N. W. 281.

[34] Approved in State v. Shelledy, 8 Iowa, 477.

[35] See volume 1, §§ 225-230, for discussion of instructions on this subject.

the defendant is not of itself sufficient to impeach or discredit his testimony, though the jury are entitled to take into consideration his interest in the event of the prosecution in determining his credibility.[36]

Interest in event to be considered.

(875) The court instructs the jury that the defendant is a competent witness in this case, and you must consider his testimony in arriving at your verdict, but in determining what weight and credibility you will give to his testimony in making up your verdict, you may take into consideration, as affecting his credibility, his interest in the result of the case, and that he is the accused party on the trial testifying in his own behalf.[37]

(876) The court instructs the jury, that under the law the defendant, in this case, is a competent witness in his own behalf, and the jury are the sole judges of the credibility of all the witnesses and the weight to be given to their testimony, and in passing on and considering the evidence in the case, the jury may consider the fact that he is the defendant on trial, together with any other fact or circumstance affecting the credit to be given the testimony of any of the witnesses in the case.[38]

VI. Credibility of Accomplice.[39]

Evidence to be received with great caution.

(877) The jury are instructed that while it is the rule of law that a person may be convicted upon the uncorroborated testimony of an accomplice, still a jury should always act upon such testimony with great care and caution, and subject it to careful examination in the light of all other evidence in the case, and the jury ought not to convict upon such testi-

[36] Approved in State v. Metcalf, 17 Mont. 417.

[37] Approved in State v. Darrah, 152 Mo. 522.

[38] Approved in State v. Wisdom, 84 Mo. 177.

[39] See volume 1, §§ 215-224, for discussion of instructions on this subject.

mony alone, unless, after a careful examination of such testimony, they are satisfied beyond all reasonable doubt of its truth.[40]

Nature of corroboration required.

(878) The jury are instructed that the corroboration ought to be sufficient to satisfy the jury of the truth of the evidence by the accomplice. If the jury are satisfied that he speaks the truth in some material part of his testimony in which they see him confirmed by unimpeachable evidence, this may be a ground for their believing that he also speaks the truth in other parts as to which there may be no confirmation, but the corroboration ought to be as to some fact connecting the prisoner with the offense, the truth or falsity of which would go to prove or disprove the offense charged against the prisoner.[41]

VII. Insanity and Intoxication.[42]

What constitutes—Irresistible impulse.

(879) The court instructs the jury that the nature, character, and degree of insanity, which exonerates a party from criminal responsibility, is not easily explained or understood. It is not necessary that it should be shown by the evidence, that the defendant at the time of the commission of the act did not know right from wrong, as to her acts in general. The inquiry must be directed to the act charged. If you believe from the evidence that the defendant's act in shooting W. (if she did shoot him) was caused by mental disease or unsoundness, which dethroned her reason and judgment with

[40] Approved in State v. Coates, 22 Wash. 601. See volume 1, §§ 216-220, for collection of cases as to right to convict on uncorroborated evidence of accomplice.

[41] Approved in Jackson v. State, 64 Ga. 345. Proper only where rule obtains that no conviction can be had on uncorroborated testimony.

[42] See volume 1, §§ 338-342, for discussion of instructions on this subject.

respect to that act, which destroyed her power rationally to comprehend the nature and consequences of the act, and which, overpowering her will, inevitably forced her to its commission, then she is not in law guilty of any crime, and your verdict as to her should be, not guilty.

But if you believe from all the evidence and circumstances in the case, that she was in the possession of a rational intellect or sound mind, and from some real or fancied injury she allowed her passion to escape control, then, though passion or revenge may, for the time have driven reason from its seat and usurped it, and urged the defendant, with a force at the moment irresistible, to desperate acts, she cannot claim for such acts the protection of insanity, and she is guilty. The practical question for you to determine from all the evidence is, whether passion and revenge or insanity, was the ruling force and controlling agency which led to the commission of this act. If you believe that the shooting was the direct result or offspring of insanity, you should acquit; if of passion or revenge, you should convict. You should indulge in no prejudice against the defense, but give it thoughtful, thorough, and dispassionate consideration, and yet the interests of society and the welfare of the state demand that this defense ought not to be regarded as sufficient to exculpate, unless you believe from the evidence that the propensity to commit the act existed in such violence as to subjugate the intellect, control the will, and render it impossible for the defendant to do otherwise than to yield to the insane impulse. In other words, it should appear not only that the mind of the accused was insane, but that the act for which she is indicted was the direct offspring of such insanity. This being shown, responsibility is annulled but not otherwise.[43]

Frenzy—Intoxication.

(880) The court instructs the jury that frenzy arising sole-

[43] Approved in State v. Stickley, 41 Iowa, 232.

ly from the passions of anger and jealousy, no matter how furious, is not insanity. A man with ordinary will power, which is unimpaired by disease, is required by law to govern and control his passions. If he yields to wicked passions, and purposely and maliciously slays another, he cannot escape the penalty prescribed by law, upon the ground of mental incapacity. That state of mind caused by wicked and ungovernable passions, resulting not from mental lesion, but solely from evil passions, constitutes that mental condition which the law abhors and to which the term malice is applied. The condition of mind which usually and immediately follows the excessive use of alcoholic liquors, is not the unsoundness of mind meant by law. Voluntary drunkenness does not even palliate or excuse.[44]

VIII. Character Evidence.[45]

Cannot prevail against clear proof of guilt.

(881) The defendant introduced evidence tending to show his good character for peace and quietness. If in the present case the good character of the defendant for peace and quietness is proven to your satisfaction, then such fact should be kept in view by you in all your deliberations, and it is to be considered by you in connection with all the other facts in the case, and if after a consideration of all the evidence in the case, including that bearing upon the good character of the defendant, the jury entertain a reasonable doubt as to defendant's guilt, it is your duty to acquit him, but if the evidence convinces you beyond a reasonable doubt of defendant's guilt, you must so find, notwithstanding his good character.[46]

[44] Approved in Guetig v. State, 66 Ind. 94.

[45] See volume 1, §§ 263-269, for discussion of instructions on this subject.

[46] Approved in People v. Mitchell, 129 Cal. 584.

(882) The court instructs the jury that whilst they may take into consideration the previous good character of defendant together with all the other facts and circumstances of the case adduced in evidence, in determining whether or not defendant is guilty of the offense charged in the indictment, yet if from the whole testimony they believe defendant is guilty, then his previous good character neither justifies, mitigates nor excuses the offense.[47]

IX. Alibi.[48]

In general.

(883) The jury are instructed that one of the defenses interposed by the defendant in this case is what is known as an alibi, that is, that the defendant was at another place at the time of the commission of the crime. The court instructs the jury that such defense is as proper and legitimate if proven as any other and all evidence bearing upon that point should be carefully considered by the jury. If in view of all the evidence the jury have a reasonable doubt as to whether the defendant was in some other place when the crime was committed, they should give the defendant the benefit of the doubt and find him not guilty. As regards the defense of an alibi the jury are instructed that the defendant is not required to prove that defense beyond a reasonable doubt to entitle him to an acquittal, it is sufficient if the evidence raises a reasonable doubt of his presence at the time and place of the commission of the crime charged.[49]

Reasonable doubt on whole evidence.

(884) The jury are instructed that if, upon a consideration of all the evidence as well that touching on the proof of an alibi as the criminating evidence introduced by the

[47] Approved in State v. Jones, 78 Mo. 278.

[48] See volume 1, §§ 278-284, for discussion of instructions on this subject.

[49] McLean v. State, 18 Neb. 159.

prosecution, then if they have any reasonable doubt of the guilt of the accused, they should acquit.[50]

Reasonable doubt raised by evidence of alibi.

(885) The jury are instructed that if there is any evidence before them which raises in their mind a reasonable doubt as to the presence of the defendant at the time and place where the crime is charged to have been committed, they must acquit the defendant.[51]

X. Admissions and Confessions.[52]

Weight to which entitled.

(886) The court instructs the jury that if verbal statements of defendant have been proven in this case, you may take them into consideration with all the other facts and circumstances proven. What the proof may show you, if anything, that the defendant has said against himself, the law presumes to be true, because against himself, but anything you may believe from the evidence that defendant said in his own behalf, you are not obliged to believe, but you may treat the same as true or false, just as you believe it true or false, when considered with a view to all the other facts and circumstances in the case.[53]

(887) The jury are instructed that it is their duty to treat and consider any confession which may have been proven as made by the defendant precisely as any other testimony, and hence if the jury believe the whole confession to be true, they will act upon the whole as true. But the jury may believe that which charges the prisoner, and reject that which is in his favor, if they see sufficient grounds in the evidence, or in any inherent probability in the statement itself. The

[50] Approved in Mullins v. People, 110 Ill. 40.

[51] Approved in State v. Adair, 160 Mo. 391.

[52] See volume 1, §§ 231-234, for discussion of instructions on this subject.

[53] Approved in State v. Darrah, 152 Mo. 522.

jury are at liberty to judge of it like other evidence by all the circumstances of the case.[54]

Admissions to be taken as a whole.

(888) The jury are instructed that when the admissions or confessions of a party are introduced in evidence by the state, the whole of the admissions or confessions are to be taken together, and the state is bound by them, unless they are shown to be untrue by the evidence. Such admissions or confessions are to be taken into consideration by the jury as evidence in connection with all the other facts and circumstances in the case.[55]

(889) The jury are instructed that in considering alleged admissions of defendant shown by the evidence, the jury must consider the entire admissions. The defendant is entitled to the benefit of what he said for himself, if true, as the state is to anything he said against himself in any conversation proved by the court. What he said against himself in any conversation, the law presumes to be true, because against himself, but what he said for himself the jury are not bound to believe because said in a conversation proved by the state. They may believe or disbelieve as it is shown to be true or false by all of the evidence in the case.[56]

CHAPTER XLII.

CROPS.

Sale by parol agreement, 890.
Right of purchaser of land to crops, 891.

Sale by parol agreement.

(890) The court instructs the jury that the law is, that growing wheat is personal property, and the subject of sale

[54] Approved in Jackson v. People, 18 Ill. 271.
[55] Approved in Pharr v. State, 7 Tex. App. 478.
[56] Approved in State v. Curtis, 70 Mo. 594.

by parol agreement, and that if the jury believe that the defendant B., after the execution and delivery of the deed to him from plaintiff G., stated that the wheat or crops in question belonged to the plaintiff, such statement by B. is evidence of a sale of the wheat in question, from said B. to said G.[1]

Right of purchaser of land to crops.

(891) The court instructs the jury that if you find, from the evidence, that one P. was the owner of a farm in this county, that he had leased said farm for the cropping season of 19— to H., the rent to be paid in a portion of the crop, to be delivered at the time of gathering, that H. had been in possession and raised a crop of corn thereon, that the tenancy, by the terms of the contract had expired, but the tenant was still in possession by the consent of said P., and was to have until the ——— of December to remove his crops, and that about the ——— day of November, after the crop of corn was entirely matured and ready for gathering, and a part had been gathered and P.'s portion placed to itself in a pen on the place, and the balance was still standing in the field, all still under the possession and control of the tenant, ready to be delivered to P. as it was gathered, and P. sold the farm to the defendant A., and gave him possession subject to the rights of H. to get off his crop, and subsequently executed and delivered to the defendant a deed in pursuance of such sale, then the rent corn going to P. did not, by virtue of such sale, and conveyance of the farm alone, pass to the defendant.[2]

[1] Bull v. Griswold, 19 Ill. 631.

[2] Approved in Moffett v. Armstrong, 40 Iowa, 484.

CHAPTER XLIII.

CUSTOM AND USAGE.

Requisites of custom or usage, 892-894.
Effect of custom or usage, 895, 896.

Requisites of custom or usage.

(892) The court instructs the jury that a usage may be proved to interpret the otherwise indeterminate intention of the parties to a contract, and to ascertain the nature and extent of the contract, but that a commercial usage to take the place of general law, must be so uniformly acquiesced in for such a length of time that the jury will feel themselves constrained to find that it entered into the minds of the parties and formed a part of the contract.[1]

(893) The court instructs the jury that a custom must be general and uniform. It must be certain, reasonable and sufficiently ancient to afford the presumption that it is generally known.[2]

(894) The court instructs the jury that by the term "general custom" is meant the general way of doing some particular thing,—the usual way of doing such thing. To establish a general custom in reference to any particular thing, or way or manner of doing such thing, it must be made to appear from the evidence that such custom was generally and uniformly extended to all persons, under like circumstances and conditions and that the same is notorious, that is, well understood. So if, in the case at bar, it does not appear from the evidence that all persons holding tickets or passes from points west of ——— to ——— were allowed to take their choice of line, either by ——— or ——— to ———, then the general custom in question in this case is not established.[3]

[1] Lyon & Co. v. Culbertson, Blair & Co., 83 Ill. 33.

[2] Leggat v. Sands' Ale Brewing Company, 60 Ill. 158.

[3] Approved in Milroy v. Chicago, M. & St. P. R. Co., 98 Iowa, 188. Instructions were not excepted to.

Effect of custom or usage.

(895) The court instructs the jury that all contracts made in the ordinary course of business without particular stipulations expressed or implied, are presumed to be made in reference to any existing usage or custom relating to such trade, and that it is competent for a party to resort to such usage to ascertain the fixed terms of the contract, and if the jury believe from the evidence (that the plaintiff delivered to defendant to be stored in the defendant's warehouse the corn described in the declaration, and that it was the custom of the trade in which the defendant was engaged to receive grain stored with him as his own property, and to ship it to the market as his own property, and that the warehouse receipt given by the defendant indicates no other intention, and if the jury believe from the evidence that it was not the intention that the identical corn was to be returned, then the jury may find the defendant liable for the value of the corn to the plaintiff though it was subsequently destroyed by fire).[4]

(896) The court instructs the jury that if they believe from the evidence that (the plaintiff was employed as an architect to make plans and diagrams of a building, described in the declaration, to be erected by the defendant, and that there was a custom in the building trade, of long standing, and well known to the public that the employment of an architect to make plans and designs for a building, carries with it an employment to superintend the construction of the building, and if the jury further believe from the evidence that plaintiff was prevented by the defendant from superintending the construction of the building, then the jury are instructed that the plaintiff is excused for abandoning the contract and may recover for the services which he actually performed, notwithstanding such abandonment).[5]

[4] Longergan v. Stewart, 55 Ill. 44.

[5] Wilson v. Bauman, 80 Ill. 493.

CHAPTER XLIV.

DAMAGES.

I. General Principles.

Limitation of liability to natural and proximate consequences, 897-899.
Same—Liability for breach of contract, 900.
Necessity of showing amount of loss with reasonable certainty, 901, 902.
Motive for breach of contract, 903.
Recovery for inconvenience, 904.
Mental suffering, 905, 906.
Avoidable consequences, 907, 908.
Same—Liability of seller for breach of warranty of quality, 909.
Same—Liability of lessor, 910.
Same—Recovery for wrongful discharge—Duty to seek other employment, 911, 912.
Same—Liability for flooding of premises caused by defective drains and sewers, 913.
Same—Liability of railroad for diverting surface water, 914.
Same—Liability of carrier for refusal to transport goods, 915.
Same—Liability of telegraph company, 916.
Same—Liability for personal injuries, 917.
Expense of attempting to avoid consequences, 918, 919.

II. Liability for Breach of Contract.

Liability for preventing performance of contract, 920.
Failure of consideration of subscription, 921.
Recovery for wrongful discharge, 922.
Recovery by water company from village for erecting water works in violation of contract between village and water company, 923, 924.
Breach of contract to keep open ditch, 925.
Breach of contract of sale—Liability of seller, 926, 927.
Same—Liability for breach of contract to sell grain to be delivered in future, 928.
Same—Liability of seller for breach of warranty, 929-931.
Same—Liability of buyer, 932-934.
Liability of vendor of land for breach of contract to convey, 935
Liability for breach of covenant against incumbrances, 936-938.
Liability for breach of contract to buy land, 939, 940.
Measure of damages for failure of defendant to procure a deed to a piece of land from a third person, 941.
Liability for breach of construction contract, 942.

Liability of client for wrongfully discharging attorney, 943.
Liability for breach of promise of marriage, 944, 945.

III. Liability of Carriers and Telegraph Companies.

Liability of carrier for refusal to transport goods, 946.
Liability of carrier for injuries to live stock, 947.
Liability of carrier for wrongfully directing passenger to leave car at place of danger, 948.
Liability of carrier for ejection of passenger, 949-951.
Liability of telegraph company for delay in transmission of telegram, 952-954.
Liability to building contractor for failure to deliver telegram, 955.

IV. Liability for Torts.

Injuries to land, 956.
Same—Removal of lateral support, 957.
Same—Action by life tenant, 958.
Trespass for polluting stream by deposit of material, 959.
Liability for trespass in taking coal from mine of another, 960.
Trespass against overseer of highways, 961.
Action to recover damages for herding cattle on plaintiff's land, 962.
Destruction of spring, 963.
Damages from fires, 964.
Injuries to land caused by overflow, 965.
Liability of railroads for diverting surface water, 966-969.
Recovery for nuisance, 970, 971.
Liability for taking or injuring personal property, 972, 973.
Action by mortgagee against levying sheriff, 974, 975.
Liability for wrongfully cutting wheat, 976.
Liability for malicious prosecution, 977-979.
Liability for false imprisonment, 980, 981.
Measure of liability for slander, 982.
Criminal conversation, 983.
Recovery for fraud in sale of land, 984, 985.

V. Liability for Personal Injuries.

In general, 986-995.
Proximate results, 996, 997.
Earning power of plaintiff, 998.
Physical and mental suffering, 999-1004.
Recovery on account of disease, 1005.
Predisposition to disease, 1006.
Injury to child, 1007, 1008.
Liability of master to parent of minor servant, 1009.

Liability of physician for malpractice, 1010.
Assault and battery, 1011.
Necessity of proof of damage—Conjecture, 1012.

VI. Aggravation or Mitigation of Damages.
Instruction under statute entitling to additional damages where there are aggravating circumstances, 1013.
Mitigation—Restoration to plaintiff before suit commenced, 1014.
Effect of reparation by third person, 1015.
Effect of reception by person injured of benefits from third person on account of injury, 1016.
Injuria sine damno—Results of breach of contract averted by acts of third persons, 1017.

VII. Exemplary or Vindictive Damages.
Definition, 1018, 1019.
Liability for trespass, 1020-1022.
Trespass against overseer of highways for removing fence, 1023, 1024.
Personal injuries, 1025, 1026.
Assault and battery, 1027.
Liability of carrier for ejecting passenger, 1028.
Liability for malicious prosecution, 1029, 1030.
False imprisonment, 1031.
Action against saloon keeper under civil damage act, 1032-1035.

I. General Principles.

Limitation of liability to natural and proximate consequences.

(897) The court instructs the jury that plaintiff can only recover such damages as flow from and are the immediate result of the injury alleged in the complaint. Damages produced by other agencies than those causing the alleged injury or even by agencies remotely connected with those causing the injury cannot be awarded as proximate or proper compensation. Where speculation or conjecture has to be resorted to for the purpose of determining whether the alleged injury results from wrongful act or from some other cause, then the rule of law excludes the allowance of damages for such injury, and if the jury believe from the evidence (illustrative facts) that the defendant railway company failed to stop its train to take on plaintiff as a passenger, and that plaintiff instead of waiting for another train or hiring a vehicle to

convey him to the next station as he might have done, walked to the next station in very cold and stormy weather, and if the jury further believe from the evidence that such unnecessary exposure to the weather produced the injuries complained of, plaintiff cannot recover for such injuries.[1]

(898) The court instructs the jury that the law does not and cannot give complete compensation for the consequences of the alleged wrong, and that the law refuses to take into consideration any damages remotely resulting from the alleged wrong, and that the jury in estimating damages must consider whether each item of loss alleged is or is not a proximate consequence of the wrong alleged.[2]

(899) The court instructs the jury that plaintiff cannot expect full compensation, and that a consequence of the alleged wrong, however proximately it caused the injury, will not be compensated unless it follows the injury in the usual course of things or as a natural consequence. In order to be compensated a consequential injury must be such a result of the alleged injury as according to common experience in the usual course of events may reasonably have been anticipated.[3]

Same—Liability for breach of contract.

(900) The court instructs the jury that the defendant is only liable for such damages as naturally arise from the breach or which may reasonably be supposed to have been within the contemplation of the parties when the contract was made as the probable result of its breach. The defendant is not liable for accidental, remote or consequential injuries.[4]

[1] Indianapolis, Bloomington & Western Ry. Co. v. Birney, 71 Ill. 391.

[2] 1 Sedgwick, Damages, p. 162, § 113.

[3] 1 Sedgwick, Damages, p. 201, § 142.

[4] Landsberger v. Magnetic Telegraph Co., 52 Barb. 530; Flynn v. Hatton, 43 How. Pr. 333.

Necessity of showing amount of loss with reasonable certainty.

(901) The court instructs the jury that a party who claims compensation for an alleged wrong done him must show not only that he has suffered a loss on account of the injury, but also what was the amount of loss, and the burden of proving both these things is upon the party alleging the wrong.[5]

(902) The court instructs the jury that in estimating damages for the wrong alleged in the declaration absolute certainty is not required, and the defendant will not be precluded from recovery because he cannot show the exact amount with certainty. If he is ready to show to the satisfaction of the jury that he has suffered large damages, the jury may act upon probable and inferential as well as upon direct and positive proof.[6]

Motive for breach of contract.

(903) The court instructs the jury that if they believe from the evidence that the defendant refused to perform his contract for the conveyance of land to the plaintiff, the jury are not to take into consideration the fact that defendant was animated by malicious motives and so violated his contract, and that the only damages to be recovered are those actually sustained by the plaintiff which are to be established by proof.[7]

Recovery for inconvenience.

(904) The court instructs the jury that damages will not be given for mere inconvenience and annoyance, such as are felt at every disappointment of one's expectations, if there is no actual physical or mental injury; and if the jury believe from the evidence (here state the facts) that plaintiff was delayed through the fault of defendant railway company and was compelled by reason of such delay to remain

[5] 1 Sedgwick, Damages, p. 245, § 170.
[6] 1 Sedgwick, Damages, p. 245, § 170.
[7] Duche v. Wilson, 37 Hun, 519.

overnight at a place distant from his destination, the jury shall not in considering the damages, allow the plaintiff for his disappointment and annoyance on account of the delay.[8]

Mental suffering.

(905) The court instructs the jury that in estimating the damages, the jury cannot allow for mental suffering, if there has been nothing more than mere vexation, lost temper or being disappointed in a particular thing.[9]

(906) The court instructs the jury that if they believe from the evidence that plaintiff was put off from defendant's train wrongfully at night as alleged in the declaration before reaching his station, and that the plaintiff fell into a culvert and was frightened by trains backing over the culvert, the jury in considering damages may allow plaintiff for the fright caused by apprehension of physical harm.[10]

Avoidable consequences.

(907) The court instructs the jury that in estimating the damages which have resulted to a plaintiff from the alleged wrongful act of the defendant, they must take into consideration whether the plaintiff by using reasonable precaution could have reduced the consequences of the defendant's wrongful act, and if the jury believe from the evidence (here state the facts) that the defendant's cattle broke down plaintiff's fence in November and plaintiff did not repair the fence until the following May, and that in the meantime other cattle got in and destroyed the crop of the following year, plaintiff cannot recover for the loss of the subsequent year's crop.

(908) The court instructs the jury that in order that plaintiff may recover expenses incurred in attempting to reduce or prevent the consequences of the alleged wrong of the de-

[8] 1 Sedgwick, Damages, § 42.

[9] 1 Sedgwick, Damages, § 47.

[10] 1 Sedgwick, Damages, § 47; Stutz v. Chicago & N. W. R. Co., 73 Wis. 147.

fendant, such expenses must be reasonable, and if the jury believe from the evidence (here state the facts) that defendant trespassed upon the plaintiff's property and made certain threats the carrying out of which would have rendered necessary the alteration of works at plaintiff's mill, but if the jury further believe from the evidence that such threats were not carried out, and that the trespass of defendant in fact only caused nominal damages, then plaintiff cannot recover for expenses incurred by him in altering the works of the mill.[11]

Same—Liability of seller for breach of warranty of quality.

(909) The court instructs the jury that if they believe from the evidence that there were defects in the goods which defendant sold to plaintiff constituting breach of the warranty which defendant is alleged to have given as to the quality of such goods, then in considering the amount of damages to be recovered by the plaintiff, they cannot include an allowance for anything which might have been avoided by plaintiff by making reasonable efforts to discover the defects and plaintiff cannot recover the damages suffered by continuing to use the goods purchased after he discovered the defects.[12]

Same—Liability of lessor.

(910) The court instructs the jury that if they believe from the evidence that defendant gave a lease to the plaintiff of the premises described in the declaration with covenant for quiet enjoyment, and that the plaintiff was prevented from obtaining possession of the premises, and if the jury further believe from the evidence that plaintiff might have found another store in a remote part of the city, but that a removal would to some extent involve the loss of the good will of his business, the plaintiff was not bound to remove to such other store in order to reduce the consequences of defendant's breach of his covenant.[13]

[11] Sibley v. Hoar, 4 Gray, 222.
[12] Draper v. Sweet, 66 Barb. 145.
[13] Poposkey v. Munkwitz, 68 Wis. 322.

Same—Recovery for wrongful discharge—Duty to seek other employment.

(911) The court instructs the jury that even if they should find under the instructions of the court that the plaintiff was wrongfully discharged, it was nevertheless the duty of the plaintiff not to remain idle, but to use every reasonable effort to procure employment, and the jury should deduct from such amount of salary as they find to have been unpaid such sums as the plaintiff earned in any other employment, and also any further sums which in their judgment he might have earned by due and reasonable industry and diligence.[14]

(912) The court instructs the jury that the plaintiff is only bound to take reasonable precautions in reducing the consequences of the defendant's wrong, and that if they believe from the evidence (here state the facts) that the plaintiff was wrongfully discharged by the defendant from defendant's employ, and that plaintiff used reasonable diligence to find other employment and could not obtain employment of a similar character to that in which he was engaged and in the same vicinity, the jury need not take into consideration the fact that plaintiff might have obtained other employment by changing his residence or going away from his family to a distant locality.[14a]

Same—Liability for flooding of premises caused by defective drains and sewers.

(913) The court instructs the jury that if they believe, from the evidence, that the plaintiffs had notice or knowledge that their ——— were being injured by the water, then it was their duty to remove the same, if they could have conveniently done so; and all damage that accrued to the said ——— after such notice the plaintiffs cannot recover, if the evidence shows that the same could have been removed without much trouble or inconvenience.[15]

[14] Approved in Equitable Endowment Ass'n v. Fisher, 71 Md. 430.
[14a] Fuchs v. Koerner, 107 N. Y. 529.
[15] City of Aurora v. Gillett, 56 Ill. 132.

Same—Liability of railroad for diverting surface water.

(914) The court instructs the jury that if you find that said embankment and culverts diverted surface water from its natural and usual course and caused the same to flow over and upon plaintiff's said land and injured his land and destroyed or injured any of his crops, and you further find that by the exercise of proper care and diligence, the plaintiff could at a moderate and reasonable expense have prevented such destruction or injury to his property, and that he failed so to do, then he cannot recover any greater sum than would have been a reasonable and fair cost of preventing such injury.[16]

Same—Liability of carrier for refusal to transport goods.

(915) The court instructs the jury that if they believe from the evidence that defendant carrier wrongfully refused to transport goods of plaintiff as defendant had agreed to do it was the duty of the plaintiff to make reasonable efforts to secure another conveyance to convey his goods and that if by the use of reasonable efforts, plaintiff could have secured another conveyance, the measure of damages will be merely the difference between the freight or price of carriage agreed on with the defendant carrier and the sum which plaintiff was obliged to pay for such other conveyance, if such price was greater than the price agreed to be paid to defendant.[17]

Same—Liability of telegraph company.

(916) The court instructs the jury that, where a party has been damaged by the wrong of another, it is the duty of such party to use reasonable efforts and reasonable diligence—that is, such diligence as a reasonably prudent man would use under similar circumstances—to avoid or lessen his damages; and if you believe from the evidence that after plaintiff had telegraphed for the plans and specifications at K., July 3,

16 Austin & N. W. Ry. Co. v. Anderson, 79 Tex. 427.
17 Ogden v. Marshall, 8 N. Y. 340.

19—, he reached C. on July 7th, and that by that time in the usual course of business the plans and specifications called for by the telegram should have reached C., and that they had not then reached C.; and you further believe under those circumstances a business man of reasonable prudence and caution would have sent another telegram to his agent at M. for the plans and specifications, and that if such a telegram had been sent by plaintiff to his agent at M., that in answer thereto, plans and specifications would have reached plaintiff before he left C., in time for plaintiff to have consummated his transactions in respect thereto, then you are charged, that if you find for plaintiff at all, you can only allow him compensation for the value of his time and expenses during the extra time he would have been kept in C. on account of the delay.[18]

Same—Liability for personal injuries.

(917) The court instructs the jury that the defendant is not liable for any damage that results to the plaintiff by reason of any lack of care on his part in properly caring for the wound which he received because of the negligence of the defendant (if the jury find such negligence), and if the jury believe from the evidence that by any act of imprudence on plaintiff's part or that by want of proper care or treatment of the wound received by plaintiff, the said wound was aggravated to such an extent as to render necessary the amputation of plaintiff's arm, and that such amputation would not have been necessary but for such lack of proper care, then the defendant is not liable for the damage resulting to plaintiff from such amputation.[19]

Expense of attempting to avoid consequences.

(918) The court instructs the jury that the plaintiff has a right to incur expense in making all reasonable efforts to repair the injury alleged to have been inflicted by the defend-

[18] Gulf, C. & S. Fe R. Co. v. Loonie, 82 Tex. 323.
[19] Dougherty v. Missouri River R. Co., 97 Mo. 647.

ant and that the plaintiff may recover the expense of a reasonable attempt to avoid the alleged consequences of defendant's wrong, though in spite of such attempt of the plaintiff, the property of plaintiff alleged to have been affected by defendant's wrong, proved a total loss.[20]

(919) The court instructs the jury that expenditures incurred by the plaintiff in attempting to remedy the alleged cause of the injury may be recovered, and that if the jury believe from the evidence (here state the facts) that the defendant negligently allowed water to flow from a pipe upon the plaintiff's premises, and that the plaintiff built a wall to prevent such flow of water after the refusal of the defendant to remedy the cause of the injury, plaintiff may recover for the building of such wall.[21]

II. Liability for Breach of Contract.

Liability for preventing performance of contract.

(920) The court instructs the jury that if the defendant while plaintiff was engaged in carrying out his contract, wrongfully prevented plaintiff from completing the contract, the measure of damages will be the difference between the price agreed to be paid for the work and what it would have cost the plaintiff to complete it.[22]

Failure of consideration of subscription.

(921) The court instructs the jury that a party who agrees to perform, and could, and fails to keep his agreement, must pay compensation for all injuries that naturally and proximately result from the breach. So far as the plaintiffs in this suit, and those they represent, are concerned, it does not appear, and is not claimed by the defendant, that there is any other consideration for the payment of the money subscribed

[20] 2 Sedgwick, Damages, § 438.

[21] Comstock v. New York Cent. & H. R. R. Co., 48 Hun, 225.

[22] Upstone v. Weir, 54 Cal. 124; Cox v. McLaughlin, 54 Cal. 605; Glaspie v. Glassow, 28 Minn. 158.

by them to a donation fund than the agreement for the removal of the manufactory of the defendant from ——— to ———, and a failure to perform that stipulation operates as a failure of consideration of the money so paid. In a case of this kind, where the defendant has received money of the plaintiff upon a consideration which has failed, or where the defendant has money of the plaintiff, which in equity and good conscience he ought to refund, in the absence of any allegation of special damages and proof thereof, the plaintiff in general is entitled to receive the money back, and lawful interest thereon from the time of payment up to the time of recovery. Therefore in this case, if the jury believe from the evidence that the consideration upon which the plaintiffs, and those they represent in this suit, paid their money, and upon which the defendant company received it, has failed, there being no allegation of special damages, the measure of damages would be the several amounts paid with interest thereon from the time of payment up to this date, at the rate of — per cent. per annum.[23]

Recovery for wrongful discharge.

(922) The court instructs the jury that if they find for the plaintiff under the instructions of the court, then the plaintiff is entitled to recover his whole salary under the contract from the time he was unpaid, if they shall find that he was not paid up to ———, 19—, less the amount they may find the plaintiff has earned since his discharge up to ———, 19—, or less the amount the plaintiff might have earned by reasonable industry and diligence within said time.[24]

Recovery by water company from village for erecting water works in violation of contract between village and water company.

(923) The court instructs the jury that the defendant and

[23] Ft. Wayne Electric Light Co. v. Miller, 131 Ind. 499.

[24] Equitable Endowment Ass'n v. Fisher, 71 Md. 430.

the plaintiff water company had a contract by which the defendant should take water for a certain number of years from the plaintiff, and that under the contract of the plaintiff, whenever ——— hydrants became necessary for the protection of the property of the inhabitants of the defendant village, plaintiff water company had a right to supply those additional hydrants. The defendant agreed in its ordinance authorizing plaintiff water company to come into the village to pay them for such fire hydrants as might afterwards become necessary. It appears from the evidence that the defendant upon erecting its own waterworks put in and supplied ——— hydrants sometime between ——— and ———. If these ——— hydrants were reasonably necessary for the protection of the property of the village, or the property of the inhabitants of the village, at that time, then plaintiff water company would be entitled to recover rental for those hydrants from the time they were put in, and you will have to determine whether or not they were necessary and allow for such as were necessary at $——— per annum from the time they were put in until ———. If the whole ——— were reasonably necessary, then the plaintiff water company would be entitled to recover for those ———. If ——— were reasonably necessary, it would be entitled to recover for ——— only, and in determining that question you will take into consideration the fact that they were ordered by the proper municipal authorities; and, also, consider the natural increase of population in the village. You will take these matters into consideration, and also apply your own judgment in regard to those matters in considering the testimony in determining the extent of the damage suffered by the company.[25]

(924) The court instructs the jury that the plaintiff's claim is that the damage suffered by the plaintiff company is the amount of the receipts of the defendant village from the time it began business in 19—, until the time of bringing of

[25] Approved in Bennett Water Co. v. Millvale Borough, 200 Pa. 613.

this suit on ———, 19—. According to the testimony, the receipts of the village from the water furnished customers by it during that time was $———. It is for you to say, as jurors in this case, whether or not that is the amount it is entitled to recover. It is entitled to recover, if you find in its favor, such amount as will make it whole; such amount as will place it in the condition it would have been financially on ———, 19—, if the village had not started its plant. The receipts of the defendant village were $———. That is not conclusive evidence that the plaintiff water company suffered to that extent by reason of the construction of the village waterworks. It is some evidence to that effect, but it is not conclusive evidence. Some of the customers of the village might not have taken water from the plaintiff water company. You must consider all the evidence and consider whether or not all these people would have taken a supply of water from the plaintiff water company. If they would all have taken water from the plaintiff instead of from the village, the plaintiff's gross receipts would have been $——— more than they were during these years. And if you should find that all the patrons of the village waterworks would have taken water from the plaintiff had not the works of the defendant been in operation, the defendant's receipts could properly be considered as an element in arriving at the damages in this case, less, however, what it would have cost the plaintiff to put these receipts into its treasury, in excess of what its expenses were at the time. While these receipts are not conclusive, as I said, and do not establish absolutely that that was the amount of the plaintiff's damages, they will afford you a basis upon which to found your calculations.[25a]

Breach of contract to keep open ditch.

(925) The court instructs the jury that if they believe from the evidence that notwithstanding the fact that de-

[25a] Approved in Bennett Water Co. v. Millvale Borough, 200 Pa. 613.

fendants have failed to keep open the ditch for the time alleged, yet if from the ——— or from other causes, the cutting and keeping open of said ditch during such time would not have drained the lands of the plaintiffs, or enabled the plaintiffs to do so, then the jury ought not to find damages resulting from the said failure as usually given.[26]

Breach of contract of sale—Liability of seller.

(926) The court instructs the jury that on a breach of contract in failing to deliver chattels or other commodities, the measure of damages is the difference between the contract price and the market value of such articles at the time they should have been delivered by the contract, and that if they believe from the evidence (that a contract was entered into by the defendants as alleged in the plaintiff's declaration for the sale of ——— at the price of ———, and that the plaintiff demanded said ——— and the defendants refused to deliver the same, then you will first ascertain from the evidence when said demand and refusal occurred and what the market price of said ——— was at the time of said demand and refusal, and if at the time of said demand and refusal the market price was higher than the price named in the contract, then you will give a verdict for the plaintiff for the difference between such market price and the price agreed upon and interest at ——— from the time of such refusal.[27]

(927) The court instructs the jury that if they believe from the evidence that the defendants contracted to deliver to plaintiffs a certain number of (hogs) at the time and manner stated in the declaration and that plaintiffs were ready and willing to pay for the (hogs) at the time and place so stated in the declaration at the price agreed upon and that

[26] Approved in Michie v. Cochran, 93 Va. 641.

[27] Sleuter v. Wallbaum, 45 Ill. 43. It would be erroneous in the instruction above given to allow the jury to consider the market price for a reasonable time after the demand and refusal, as such a rule would be indefinite and uncertain.

defendants without sufficient excuse failed to deliver the hogs (in accordance with the terms of the contract) then the jury are instructed that they will find for the plaintiff and that the measure of damages in this case will be the difference between the contract price of the (hogs) and what the (hogs) were actually worth in the market at ——— where they were to be delivered.[28]

Same—Liability for breach of contract to sell grain to be delivered in future.

(928) The court instructs the jury that if, in this case, the jury find for the plaintiff, they will assess the plaintiff's damages at the difference between the contract price of the grain in question and the price and value of grain in ———, where the grain was to be delivered at the date of the breach of contract, if the jury believe, from the evidence, that there has been a breach of said contract.[29]

Same—Liability of seller for breach of warranty.

(929) The court instructs the jury that if you believe, from the evidence, that the defendant, ———, represented to the plaintiff, ———, that the (hams) in question were first-class hams, equal in quality to any brand of hams made in this market, and that such representation was made by defendant with the intention thereby of warranting the hams to be of such quality, and to induce the plaintiff to buy the same, and that plaintiff purchased said hams relying upon such representation as a warranty of the quality, and that at the time of purchasing the hams they were not of the quality represented, but were of a poor, inferior and bad quality, then your verdict will be for the plaintiff. And upon the question of damages, the court instructs you that, if you believe from the evidence plaintiff, at the time of such sale to him, had a contract for the resale of said hams to one D.,

[28] Bird v. Forceman, 62 Ill. 212.

[29] Sanborn v. Benedict, 78 Ill. 309.

———, and that he had sold the same as hams of the quality aforesaid, and that, at the time of the sale to the plaintiff, the defendant had knowledge of such contract of resale, and knew that the plaintiffs purchased said hams to fulfill said contract of resale, and that the hams were shipped to ——— before the plaintiff had any notice of their quality, and that upon their arrival at ——— the said D. refused to receive or pay for the same for the reason that they were not, at the time of their shipment to him, of the quality he had bargained for, then you will award to the plaintiff as damages such sum of money as you may believe, from the evidence, the plaintiff had sold said hams to said D. for, less such sum as you may believe, from the evidence, said hams were actually worth at the time of their purchase by the plaintiff, and you will further allow the plaintiff such sum of money if any, as you may believe from the evidence, he was obliged to pay out on account of the transportation of said hams to said ———.[30]

(930) The court instructs the jury that plaintiff will be entitled to the amount of damages directly and naturally resulting from the alleged breach of contract by the defendant and if the jury believe from the evidence that (here state the facts) defendant sold oil to plaintiff to be used in the manufacture of carpets, the oil warranted to be of a certain quality and the oil was not of the quality represented and warranted by the defendant, and the plaintiff sold carpets after he became aware of the vicious quality of the oil and the sales were made under circumstances which left no liability on the part of plaintiff to the purchaser, then the measure of damages to be recovered by the plaintiff would be only the difference between the price actually received from the purchaser and the value of the carpets as they would have been if the oil had been as recommended.[31]

[30] Thorne v. McVeagh, 75 Ill. 81.

[31] Waite v. Borne, 123 N. Y. 592.

(931) The court instructs the jury that if they believe from the evidence that the defendant sold to plaintiff a certain article (as certain coloring matter) to be used by plaintiff for a purpose known to defendant (as for coloring certain kinds of ice cream which plaintiff manufactured) and if the jury further believe from the evidence that said article so sold to the plaintiff did not fulfill the warranty or the purpose known to the defendant (but that such coloring matter contained arsenic which caused the customers of the plaintiff to become sick) then plaintiff may recover as damages not merely the difference between the value of the goods sold if they had been as represented and their value as they actually were, but may recover the value of the ice cream destroyed because of the arsenical compound and also the loss of business caused to the plaintiff by selling the poisonous ice cream and the expense thereby occasioned.[32]

Same—Liability of buyer.

(932) The court instructs the jury that if they believe from the evidence that plaintiff was to furnish to defendant certain quantities of goods for use by the defendant in defendant's factories for a certain period as alleged in the complaint and that subsequently defendant refused to take any more goods from plaintiff as he had agreed to do and upon receiving notice plaintiff ceased to manufacture under the contract, then the plaintiff may recover as damages, if the jury should find that there was no market value for the article which plaintiff was to furnish to defendant, the difference between the cost of the production of the article which defendant refused to take and the contract price.[33]

(933) The court instructs the jury that if they believe from the evidence that the defendant refused to accept the goods which he had agreed to buy from the plaintiff as alleged in the declaration and if the contract price of the goods and

[32] Swain v. Schieffelin, 134 N. Y. 471.

[33] Todd v. Gamble, 148 N. Y. 382.

the market price are the same, then the plaintiff can only recover nominal damages.[34]

(934) The court instructs the jury that if under the court's instructions the jury shall find for the plaintiff, the measure of damages is the profit which they shall find from the evidence he would have made if the contract had been fully performed by him.[35]

Liability of vendor of land for breach of contract to convey.

(935) The court instructs the jury that if defendant made a contract to convey the premises described in the declaration to the plaintiff as alleged in the declaration, and that after the making of the contract and before the time of performance he sold the property to one other than the plaintiff, the defendant will be liable for substantial damages.[36]

Liability for breach of covenant against incumbrances.

(936) The court instructs the jury that if they believe from the evidence that the defendant made a conveyance to the plaintiff of the premises described in the declaration and covenanted against incumbrances, and that there are incumbrances upon such premises in violation of the covenant, but that such incumbrances do not interfere with the enjoyment by plaintiff of the premises, plaintiff can only recover nominal damages.[37]

(937) The court instructs the jury that if they believe from the evidence that the incumbrances which are alleged to constitute a breach of defendant's covenant against incumbrances are of a permanent nature, such as plaintiff cannot remove, he should recover a just compensation for real injury resulting from the continuance of the incumbrance.[38]

[34] Ellithorpe A. B. Co. v. Sire, 41 Fed. 662; Foos v. Sabin, 84 Ill. 564.

[35] Approved in Baltimore & O. R. Co. v. Brydon, use of Davis & Co., 65 Md. 198.

[36] Tracy v. Gunn, 29 Kan. 508.

[37] Harlow v. Thomas, 15 Pick. 66.

[38] Harlow v. Thomas, 15 Pick. 66.

(938) The court instructs the jury that if they believe from the evidence that the defendant violated, as alleged in the declaration, his covenant against incumbrances in his conveyance to plaintiff, and that plaintiff has extinguished the incumbrance alleged to constitute a breach of covenant, then plaintiff should recover the expenses necessarily incurred in extinguishing such incumbrance.[39]

Liability for breach of contract to buy land.

(939) The court instructs the jury that if they believe from the evidence that defendant refused to accept a conveyance of land which he had agreed to buy as alleged in the declaration, the measure of damages to be recovered by the plaintiff will be the difference between the price plaintiff was to receive under his contract with defendant and the value of the land which was left on plaintiff's hands.[40]

(940) The court instructs the jury that if they believe from the evidence that the defendant has refused to take the land which he agreed to buy from plaintiff as alleged in the declaration, although the plaintiff has tendered a deed of the land which tender has never been withdrawn, plaintiff may recover as damages the contract price.[41]

Measure of damages for failure of defendant to procure a deed to a piece of land from a third person.

(941) The court instructs the jury that if they believe from the evidence that the defendant did not act in bad faith either in making the contract to procure the deed or in failing to perform his contract, and if the jury further believe from the evidence that plaintiff was informed of the defendant's inability to procure a deed from ———, then the measure of damages will not exceed the value of the premises to be con-

[39] Harlow v. Thomas, 15 Pick. 66.

[40] 3 Sedgwick, Damages, § 1023.

[41] Alma v. Plummer, 4 Me. 258; Goodpaster v. Porter, 11 Iowa, 161.

veyed by ——— at the time when plaintiff was informed by the defendant of his inability.[42]

Liability for breach of construction contract.

(942) The court instructs the jury that if they believe from the evidence that the contract was made as alleged in the declaration by the defendant to build the house described in the declaration for plaintiff and that defendant did not follow the specifications contained in the contract but departed therefrom in building the house, then the measure of damages of plaintiff will be the difference in the value between the house as it was in fact finished by the defendant and as it would have been if he had accurately carried out the provisions of the contract and the plaintiff cannot recover such an amount as would be necessary to make the building conform to what the specifications required.[43]

Liability of client for wrongfully discharging attorney.

(943) The court instructs the jury that if they believe from the evidence that defendant retained plaintiff to take charge of the litigation described in the declaration and that thereafter defendant wrongfully discharged plaintiff, the measure of damages will be the full amount of compensation agreed upon less the expenses which would have been incurred by plaintiff in carrying out the agreement and that plaintiff was not under obligation to seek other employment for the time in which he would have been employed by defendant if he had carried out his agreement.[44]

Liability for breach of promise of marriage.

(944) The court instructs the jury that in cases of this kind the damages are always in the discretion of the jury and in fixing the amount they have a right to take into consid-

[42] Gale v. Dean, 20 Ill. 320.

[43] Morton v. Harrison, 52 N. Y. Super. Ct. (20 J. & S.) 305.

[44] Hunt v. Test, 8 Ala. 713; Brodie v. Watkins, 33 Ark. 545; Myers v. Crockett, 14 Tex. 257.

eration the nature of the defense set up by the defendant, and if the jury believe from the evidence that the defendant promised marriage to the plaintiff and then refused to carry out his promise, and if the defense set up by the defendant in this case is not sustained by the evidence (the defense being injurious to the reputation of the plaintiff) then the jury will be justified in giving exemplary damages.[45]

(945) The court instructs the jury that, if you find the contract was made, and has been broken, and consider the question of damages you may take into consideration the character of the plaintiff. If it is subject to any criticism on your part, and if she is a woman of coarse manners, coarse in her associations, and imprudent, careless and reckless in regard to her conduct and demeanor, these circumstances you may take into consideration in assessing damages; such a woman is not injured to the same extent by a breach of promise of marriage that one more confiding, retiring, and modest would be. Understand that I am passing no judgment upon the plaintiff or suggesting that you shall pass any judgment upon her, but I wish you to understand that if you think she deserves consideration of that kind, it is your privilege and duty to give such consideration to that phase of the matter as you think it deserves.[46]

III. Liability of Carrier and Telegraph Companies.

Liability of carrier for refusal to transport goods.

(946) The court instructs the jury that if they believe from the evidence that defendant wrongfully refused to transport the goods of plaintiff, the measure of damages to be recovered by plaintiff will be the difference between the value of the goods at the place of shipment and the value at the place where they were to be delivered, when they

[45] Southard v. Rexford, 6 Cow. 254.

[46] Approved in Kelley v. Highfield, 15 Or. 277.

should have arrived, after deducting freight or price of carriage.[47]

Liability of carrier for injuries to live stock.

(947) The court instructs the jury that if you believe from the evidence that the cattle in question were by the negligence of defendant injured during transportation, then you are instructed that the measure of damages would be the difference in the market value of such cattle at the place of destination at the time they arrived there in their injured condition, if injured, and their market value at such place of destination in the condition they would have been in when they should have arrived there, but for such injuries.[48]

Liability of carrier for wrongfully directing passenger to leave car at place of danger.

(948) The court instructs the jury that if they find for plaintiff in this case, they will give her such amount of damages as in the judgment of the jury will compensate her for any physical injuries directly resulting from the negligence complained of, as well as mental suffering resulting therefrom. This does not include punitory damages, but does include such pain, suffering in body and mind as you may find from the evidence she has suffered from the negligence of defendant and without her fault and which is directly the result of such negligence.[49]

[47] Galena & C. U. R. Co. v. Rae, 18 Ill. 488; Bridgman v. The Emily, 18 Iowa, 509; People v. New York, L. E. & W. R. Co., 23 Hun, 533.

[48] Approved in Gulf, C. & S. F. Ry. Co. v. Miller, 24 Tex. Civ. App. 430.

[49] Stutz v. Chicago & N. W. R. Co., 73 Wis. 147. In this case the plaintiff was directed to leave the cars several hundred feet from the platform and in order to reach the highway, it was necessary for plaintiff to walk along the side track some distance and in doing so plaintiff fell into an open culvert and while struggling to extricate herself from the culvert, plaintiff was frightened by cars approaching, although they did not come nearer than 100 feet. The

Liability of carrier for ejection of passenger.

(949) The court instructs the jury that if they shall under the evidence, find the defendant guilty of the trespass charged against it, then in assessing plaintiff's damages, the jury are at liberty, not only to assess the damages at such a sum as to compensate plaintiff for such pecuniary injury as he has suffered, in consequence of such trespass, if the jury believe from the evidence that plaintiff has suffered any pecuniary injury, but also to compensate plaintiff for the feelings of shame or humiliation which he endured, in consequence of being thus put off and expelled from a public conveyance, provided the jury shall believe from the evidence, that plaintiff did in fact endure and experience such feelings of shame and humiliation in consequence of such treatment by defendant.[50]

(950) The court instructs the jury that, in the first place, if the plaintiff is entitled to recover any damages, he is entitled to such damages as he has actually suffered; and, in estimating the amount they will not be limited to what he has lost in dollars and cents; that they may properly consider the injury to his feelings, his wounded pride, his wounded self-respect, his mental pain and suffering occasioned by the assault, and the feeling of degradation that necessarily resulted from it; that a man's feelings, self-respect, and pride of character are as much under the protection of the law in such case as his property; that, in estimating the damages for a personal assault attended with opprobrious and insulting language, the jury have a right to consider the character and standing of the person assaulted, and the injury to his feelings as well as the injury to his person, and then to give him such damages as, in the view of all the circumstances, would be a just compensa-

court held that in considering damages, these surrounding circumstances should be taken into consideration by the jury.

[50] Chicago & N. W. R. Co. v. Chisholm, Jr., 79 Ill. 584.

tion for the injury actually suffered; that, if the injury was wanton, malicious, committed in reckless and willful disregard of the rights of the injured party, the law allows the jury to give what is called punitive or exemplary damages.[51]

(951) The court instructs the jury that if from the evidence in this case, they should find a verdict for the plaintiff, in assessing plaintiff's damages, they are not confined to the actual damages which the plaintiff suffered by reason of being expelled from defendant's cars against his will, but the jury, if they believe from the evidence, that the alleged ejection of plaintiff was attended by unnecessary violence and that the ejection was done in such a manner as to expose plaintiff to ridicule of other passengers, may take such facts into consideration and may award exemplary or punitive damages.[52]

Liability of telegraph company for delay in transmission of telegram.

(952) The court instructs the jury that if they believe from the evidence that a message was delivered by plaintiff to defendant telegraph company for transmission as alleged in the declaration and that the message conveyed instructions to buy stock on the market at New York City and that because of the delay in transmission the message did not arrive at its destination until the day after it should have arrived, plaintiff may recover as damages the difference between the market value of the stock on the day on which the message should have arrived and the sum which he paid on the following day when it did actually arrive.[53]

(953) The court instructs the jury that if they believe from the evidence that the plaintiff delivered to the defend-

[51] Approved in Goddard v. Grand Trunk Ry. Co. of Canada, 57 Me. 202.

[52] Toledo, P. & W. R. Co. v. Patterson, 63 Ill. 304.

[53] Pearsall v. W. U. Tel. Co., 124 N. Y. 256.

ant, a message directing or conveying instructions to buy a certain amount of wheat as alleged in the declaration and that if the order had been carried out on the day that it should have been transmitted, and if the wheat had been re-sold, plaintiff would have made a profit, but if the jury further believe from the evidence that no instructions were given as to when the wheat to be bought should be re-sold, and it was altogether uncertain whether the plaintiff would or would not have re-sold it, then no actual loss is shown and plaintiff can only recover nominal damages.[54]

(954) The court instructs the jury that if you believe from the evidence in this case that plaintiff delivered a telegraphic message to defendant telegraph company to be sent to Dr. ——— at ———, which telegraphic message purported to inform Dr. ——— that the child of plaintiff was sick and asked Dr. ——— to come at once, and if the jury believe from the evidence that defendant undertook to transmit and deliver such telegraphic message and that by the use of reasonable diligence, such message would have been delivered in time for Dr. ——— to have visited plaintiff's sick child on that night, and that the said doctor would have gone on the ——— train if he had received the telegraphic message when it should have been delivered, and that the telegraphic message was not delivered in time for the doctor to take the train that day and that the delay in the delivery of the telegram was caused by lack of reasonable diligence on the part of defendant, then the jury will find for plaintiff and assess his damages at such sum as in your judgment will compensate him for any mental suffering he may have sustained and experienced by reason of such negligent failure of defendant to deliver such message.[55]

Liability to building contractor for failure to deliver telegram.

(955) The court instructs the jury that the measure of

[54] W. U. Tel. Co. v. Hall, 104 U. S. 444.

[55] Gulf, C. & S. F. Tel. Co. v. Richardson, 79 Tex. 649.

damages is the amount plaintiff paid to have said message sent to ———, at ———, and the value of the services of plaintiff for any time he may have been compelled to lose by reason of such negligent failure, if any, to deliver said telegram. And if you find that the plaintiff was engaged in constructing the ——— in said ——— county as he alleges in his petition, and that it was necessary for him to purchase certain material for the completion of said building as charged in the petition, and shall further find that he was compelled to pay more for said material on account of the failure to deliver said telegram in due time as plaintiff alleges, then you will find for plaintiff as damages the difference between the price at which the plaintiff could have purchased said material if said telegram had been delivered in a reasonable time, and the price, if any, plaintiff was forced to pay for said material by reason of the negligent failure, if any, to deliver said telegram in a reasonable time.[56]

IV. Liability for Torts.

Injuries to land.

(956) The court instructs the jury that the question for you to determine is what it would cost plaintiff to fill up the excavation made by defendant; and you may take into consideration how long it will be, after the filling of the excavation, before the ground will be in a condition to use as farm land. The measure of damages is what it is worth, or will cost plaintiff to put her land in the same condition it was in before the trespass (if it can be done) and such other damages as she may have sustained from the loss of the use of the land.[57]

Same—Removal of lateral support.

(957) The court instructs the jury that there is inci-

[56] Approved in Gulf, C. & S. F. R. Co. v. Loonie, 82 Tex. 323.
[57] Approved in Walters v. Chamberlin, 65 Mich. 333.

dent to land in its natural condition, a right to support from the adjoining land; and if land not subject to artificial pressure, sinks or falls away in consequence of the removal of such support, the owner is entitled to damages to the extent of the injury sustained. The measurement of damages in such case is not the cost of restoring the land to its former condition or situation, or of building a wall to support it, but it is the diminution in value of the plaintiff's land by reason of the acts of the party removing the support.[58]

Same—Action by life tenant.

(958) The court instructs the jury that there is no evidence in this cause which would justify them in awarding exemplary or vindictive damages, and that the plaintiff is not entitled to recover for injuries to the interests of the reversioners in the property alleged to have been damaged by excavation on an adjoining lot causing a settling of foundations of her house, nor for the failure of her tenants to pay rent in accordance with their contracts, nor for any loss of rent or diminution of rental value due to depression of the property by reason of gradual wear and tear or failure to keep the same in repair on her part; and inasmuch as it appears from the uncontradicted evidence offered by the plaintiff that she is over — years of age, and there is no evidence in the cause of any other loss or damage suffered by her than loss of rent, the plaintiff can at most recover the amount of any rent which she may prove to have lost between the ——— day of ———, 19— (the time of the injury), and the time of trial, and in addition thereto whatever they may find to be the present value to her of whatever rent, if any, they may find that she will lose during the remainder of her life, in so far as such part or prospective loss

[58] Approved in Moellering v. Evans, 121 Ind. 195.

to her may be due to the acts complained of in the plaintiff's declaration and not otherwise.[59]

Trespass for polluting stream by deposit of material.

(959) The court instructs the jury that if they find the plaintiff is entitled to recover, the true measure of damages for permanent injury in this case is the cost of removing the ———, unless the expense of removal of the ——— exceeds the value of the entire property, in which case the value of the property is the limit of the measure of damages, and in no event can there be a recovery in excess of the value of the entire property for a permanent injury.[60]

Liability for trespass in taking coal from mine of another.

(960) The court instructs the jury that if they believe from the evidence that the defendant trespassed upon plaintiff's land, and mined coal therefrom, and converted it to its own use, the jury are to be in nowise limited by the value of the land itself, but must regard the instructions of the court upon the question of what is the proper measure of damages, and if the jury believe, from the evidence, that the defendant, by its servants and employees, mined coal from plaintiff's land without his consent, as alleged in the declaration, and did so by mistake or inadvertence, and without knowledge that the coal was being mined from plaintiff's land, then the jury are bound to allow plaintiff the value of the coal taken from his land within ——— years before this suit was commenced, estimated at the pit mouth, less the cost of carrying it where it was dug to the pit mouth, or, in other words, the plaintiff, under the above circumstances, is to be allowed the value of the coal at the pit mouth, less the cost of carrying it there from the place where it was dug,

[59] Approved in Bonaparte v. Wiseman, 89 Md. 12.

[60] Approved in Stevenson v. Ebervale Coal Co., 201 Pa. 112.

allowing defendant nothing for the digging, the verdict, however, not to exceed the sum prayed for in the declaration.[61]

Trespass against overseer of highways.

(961) In assessing the actual damages sustained by plaintiffs, the jury should allow such sum as would reasonably be sufficient to pay for material and labor required to rebuild plaintiffs' fence and gates, and place them in as good condition as they were before they were torn down; and in addition thereto they should allow reasonable compensation for the injury to the use of plaintiffs' goods arising out of the defendants' acts for such time as would reasonably be required to rebuild such fence and repair said gates and rebuild them.[62]

Action to recover damages for herding cattle on plaintiff's land.

(962) The court instructs the jury that the measure of plaintiff's damage for the loss or injury to the grass for the years ——— and ———, if you find that he has sustained any damages in that regard, will be the actual damage done to the grass and crop for these years by the defendant's cattle; that is the difference between the actual market value of the crop upon the land for those years as it was and what its market value would have been had the plaintiff's cattle not been driven or herded or pastured upon the land. To state it in other words, the question for you to determine from the evidence in fixing the amount of damages, if any, on this claim is how much less was the actual rental value of the land for the grass crop of these years by reason of the defendant's cattle having been driven or herded upon the land than it would have been had the cattle not been driven or herded upon the land? If you find that the plaintiff is entitled to recover in this case you will ascertain whether he has sustained any damages by reason of any permanent

[61] Illinois & St. L. R. & Coal Co. v. Ogle, 82 Ill. 627.

[62] Approved in McBeth v. Trabue, 69 Mo. 642.

injury to the growth of grass on said land. The plaintiff's damages upon this claim, if he is entitled to recover any, will be such only as injuriously affect the market value of the land. The question here to be determined is how much less, if any, was the land worth in the market by reason of the defendant's cattle having been driven or herded upon the land than it would have been had the cattle not been herded or driven on the land.[63]

Destruction of spring.

(963) The court instructs the jury that if they believe that the spring mentioned in the deed offered in evidence, supplied at the time said deed was executed sufficient pure water for the use of the plaintiff's stock and shall further believe that the defendant has destroyed said spring and the stream which supplied the same or should believe that the defendant has so permanently injured said spring and stream, that the supply of water is and will hereafter be insufficient for the use of plaintiff's stock or so impure as to be unfit for the use of said stock, and such impurity will be permanent, and the plaintiff is injured thereby, then the jury may give such damages as they shall believe the plaintiff has sustained therefrom; and if the jury shall believe that said injuries, if any, are permanent, then the jury may give such prospective damages as the jury may believe the plaintiff will sustain.[64]

Damages from fires.

(964) The court instructs the jury that the rule for the measure of damages, if there is a right of recovery, is the difference, if any, between the fair market value of the land burned over, belonging to the plaintiff, immediately before the fire and its fair market value immediately afterwards.[65]

[63] Approved in Harrison v. Adamson, 86 Iowa, 693.
[64] Chamberlain v. Baltimore & O. R. Co., 66 Md. 518.
[65] Chicago, I. & L. Ry. Co. v. Brown, 157 Ind. 544.

Injuries to land caused by overflow.

(965) The court instructs the jury that the general rule for the measure of damages, which the jury may find applicable in this case, is this; if the lowest amount of damages which will make good the loss sustained by plaintiff will be the difference between the value of the plaintiff's land before the alleged injury in ——— and its value after the alleged injury, as resulting from the overflow, not a decrease in value caused by other causes, if there were other causes, but the difference between the value of the property before the overflow and its value after the overflow, as affected by such overflow, that will be one way of estimating the damages. If the jury find from the evidence that the cost of repairing or making the property as good as it was before the overflow, is less than the amount of damages which would be arrived at by the rule above given, then they shall return a verdict for the cost of repairs or of restoring the property to its ordinary condition.[66]

Liability of railroads for diverting surface water.

(966) The court instructs the jury that if you find that the defendant constructed said embankment and culverts, and that between said ——— day of ———, 19—, and the ——— day of ———, 19—, during ordinary rains, surface water was thereby diverted from its usual and ordinary course and caused to flow over and upon plaintiff's land and destroyed or injured plaintiff's crop or crops of corn or cotton, if any he had growing thereon, then you will find for the plaintiff the reasonable value of the crop so destroyed if any was destroyed, at the time and place of its destruction; and such further sum as will fairly compensate him for the injury, if any thereby caused, to any of said crops not destroyed; allowing for only such injury as was caused by said embankment and culvert causing water

[66] Helbing v. Allegheny Cemetery Co., 201 Pa. 171.

to flow on said land, which otherwise would not have flowed there.[67]

(967) The court instructs the jury that if you find that plaintiff's said land within the time hereinbefore stated was permanently injured or any of his crops within said time destroyed or injured by water flowing thereon, and said embankment and culverts on defendant's road bed by diverting water from its natural and usual course, contributed to such damage, destruction or injury, but that the same was caused in part by water falling and running on said land regardless of said embankment, then defendant would be liable for only such proportion of said injury as was caused by said embankment, and if you so find and find for plaintiff, you will allow damages herein for only such proportion of the damage covered by said embankment and culverts.[68]

(968) The court instructs the jury that if you find from the testimony that the defendant in constructing its road bed threw up an embankment near the plaintiff's said land, and put one or more culverts under said road, and that during ordinary rains at any time between the ——— day of ———, 19—, and the ——— day of ———, 19— (time set out in complaint), such embankment and culverts diverted surface water from its natural and usual course and caused it to flow over and upon plaintiff's said land, and thereby permanently injured said land, then you will find for plaintiff the amount of said injury which will be the difference between the market value of said land immediately before and immediately after the injury; and if you find more than one such injury between said dates, then the difference in such value immediately before the first and immediately after the last injury. But you cannot allow

[67] Approved in Austin & N. W. Ry. Co. v. Anderson, 79 Tex. 427, and expressly commended.

[68] Approved in Austin & N. W. Ry. Co. v. Anderson, 79 Tex. 427.

him for any such injury as may have been caused by rains before the ——— day of ———, 19— (the date of commencement of injury averred), nor for such injury, if any, as would have resulted to said land if said embankment and culvert had not been built by reason of the natural flow, if any, of water that would have been on said land.[69]

(969) The court instructs the jury that any interference with the drainage of the plaintiff's lands or the flow of surface water which could not be prevented by the proper and skillful construction of defendant company's road with proper and skillfully constructed culverts, was proper to be taken into consideration by the plaintiff when the defendant company purchased its right of way from the plaintiff, and if the jury believe from the evidence that the railroad through plaintiff's land was properly and skillfully constructed, with properly and skillfully constructed culverts, in proper numbers, and that the same have been kept in proper order, then they cannot assess any damages against the said defendant company on account of ponds or of accumulations of water, though caused by the building and construction of said road.[70]

Recovery for nuisance.

(970) The court instructs the jury that if they find for the plaintiff, then in awarding damages they may consider the interference caused by defendant with the use to which the property in question has been put by the plaintiff, including any loss of rental and destruction of business up to the time of bringing this suit, and also any discomfort to the plaintiff occasioned thereby up to the time of bringing the suit.[71]

[69] Approved in Austin & N. W. Ry. Co. v. Anderson, 79 Tex. 427.

[70] Norfolk & Western R. Co. v. Carter, 91 Va. 587. This was an action on the case.

[71] Approved in Susquehanna Fertilizer Co. of Baltimore City v. Malone, 73 Md. 268.

(971) The court instructs the jury that if you believe from the evidence that the stock yards maintained by the defendant in the vicinity of the plaintiff's home constituted a nuisance, then you will proceed to assess and determine from the evidence the amount of damages plaintiff is entitled to recover by reason of the existence of such nuisance and the measure of such damages will be the loss or diminution of the fair and reasonable value of the property of plaintiff from the time you find that said nuisance was established up to the commencement of this suit.[72]

Liability for taking or injuring personal property.

(972) The court instructs the jury that if they believe from the evidence that defendant carried away (hay or corn, etc.) belonging to the plaintiff as alleged in the declaration, the damages to be recovered by plaintiff will be the value of the property carried away with interest from the time of the trespass and that the market price is usually the evidence of such value.[73]

(973) The court instructs the jury that if they believe from the evidence that defendant carried away (corn or hay) belonging to plaintiff as alleged in the declaration, in considering the damages to be recovered by the plaintiff, they are not to regard the market price as the only evidence of the value of the property carried away but that the value as between the plaintiff and defendant may under certain circumstances be higher or lower than the market price and that if the jury believe from the evidence that the defendant had knowledge of a contract which plaintiff had made for delivery of the hay or corn to a third person at a price considerably above that of the market price, then the price fixed by such contract with the third person

[72] Shively v. Cedar Rapids, I. F. & N. W. R. Co., 74 Iowa, 169.

[73] 2 Sedgwick, Damages, § 433.

must be the measure of damages rather than the market price.[74]

Action by mortgagee against levying sheriff.

(974) The court instructs the jury that if you find from the evidence that the plaintiff was entitled to recover, she can only recover the actual value of the goods at the time of the seizure and when arriving at this value you have the right to take into consideration all the evidence in the case as to the character and condition of the goods, whether new or second hand, or in good or bad condition, and also the evidence of the length of time the goods have been in stock, how they have been used, and how long in stock, and the fact that they have passed from hand to hand for a number of years.[75]

(975) The court instructs the jury that if they find that the plaintiff is entitled to recover, then, in arriving at the amount of your verdict, you must take into consideration the market value of the goods in question at the time of the seizure; and in arriving at this market value you have the right to consider the question as to whether the condition of the goods had changed between the day of the seizure and the day of the sale and you may also consider in this connection, the amount that these goods brought at public auction under the execution sale as bearing upon this question, as bearing upon the market value at the time of the seizure and upon the amount of your verdict.[76]

Liability for wrongfully cutting wheat.

(976) The court instructs the jury that if they believe, from the evidence, that the wheat in question was the property of the plaintiff, G., and that the defendant willfully cut and carried away the same, then the defendant is not

[74] 2 Sedgwick, Damages, § 433.

[75] Approved in Showman v. Lee, 86 Mich. 556.

[76] Approved in Showman v. Lee, 86 Mich. 556.

entitled to receive or deduct from the value of the wheat so taken, the expense of harvesting the same, but the plaintiff is entitled to recover the full value thereof, the same as if he had harvested the same himself.[77]

Liability for malicious prosecution.

(977) The court instructs the jury that if you find for plaintiff, it will be your duty to award plaintiff such damages as will adequately compensate him for such loss and injury which from the evidence you shall find plaintiff suffered and that plaintiff should be made whole for his loss of time, his anxiety and suffering and any injury to his reputation caused by his being arrested and imprisoned and if the jury should allow plaintiff anything on account of vindictive damages, you may, in your discretion, in assessing the amount of such damages, take into consideration the proper and reasonable expense of defending the criminal prosecution instituted by defendant and complained of in this action.[78]

(978) The jury are instructed, that if, from the evidence and instructions of the court you find for the plaintiff, then in assessing the amount of the plaintiff's damages you have a right to take into account, and the plaintiff is entitled to recover compensation for his loss of time, and for his suffering both bodily and mental, including the injury to his reputation and feelings, if any, sustained by the wrongful act of the defendant, and if the jury believe the act complained of was committed with actual malice and a design to injure or oppress the plaintiff, the plaintiff may also recover punitive or exemplary damages, that is to say the jury will not be limited to mere compensation for the actual damages sustained by him, but you may give him such further damages as you may think right in view of all the circum-

[77] Bull v. Griswold, 19 Ill. 631.
[78] Bell v. Matthews, 37 Kan. 686.

stances proved at the trial as punishment to the defendant and as a salutary example to others to deter them from offending in like manner.[79]

(979) The court instructs the jury that if they find for plaintiff in this case, they may in considering the question of damages take into consideration what money plaintiff paid, if any, for attorney's fees, in defending himself against the charge made the basis of the prosecution complained of in this suit.[80]

Liability for false imprisonment.

(980) The court instructs the jury that if they believe from the evidence that the defendants were guilty of the wrongful act or acts alleged in the declaration, they must award to the plaintiff such compensation in damages as he may prove for the loss of time, for the suffering, bodily and mental, sustained by reason of such wrongful act or acts, and for expenses incurred in procuring discharge from restraint, including a reasonable attorney's fee. And if the jury believe from the evidence the said wrongful act or acts to have been committed by the defendants with malice, they may also award to the plaintiff punitive damages.[81]

(981) The court instructs the jury that in estimating damages, the jury are not to be confined to actual damages, but are at liberty to assess damages proportionate to the circumstances of outrage attending the illegal arrest. The limit of the sum, if you find for plaintiff, is in any sum less than $———.[82]

Measure of liability for slander.

(982) The court instructs the jury that if the jury believe, from the evidence, that the defendant is guilty of ut-

[79] Jones v. Morris, 97 Va. 43.
[80] Murphy v. Larson, 77 Ill. 172.
[81] Bolton v. Vellines, 94 Va. 393.
[82] Approved in Hall v. O'Malley, 49 Tex. 70.

tering the slanderous words charged in the declaration, they may take into consideration the pecuniary circumstances of defendant, and his position and influence in society, in estimating the amount of damages; and if they shall also find, from the evidence, that the defendant obtruded himself into plaintiff's house, and there offered undue familiarities to his wife, at the time and on the occasion of the uttering of the words in question, these circumstances may also be taken into consideration in fixing damages, and the jury in their discretion may give damages by way of punishment to the defendant, proportioned to the circumstances in evidence, as well as for compensation.[83]

Criminal conversation.

(983) The court instructs the jury that if they find for the plaintiff, in determining the question of damages, they may consider the injury to his domestic peace and happiness and alienation of the affections and the society of his wife, if you believe from the evidence that such alienation is proved, and the wrong inflicted upon plaintiff's honor.[84]

Recovery for fraud in sale of land.

(984) The court instructs the jury that if they believe from the evidence that defendant made the alleged fraudulent representations with regard to the value of the land which the plaintiff agreed to buy from the defendant, plaintiff may recover as damages the difference in value between the land as it would have been if it had been as represented and as it actually was.[85]

(985) The court instructs the jury that if they believe from the evidence that the defendant falsely represented to the plaintiff at the time of making the contract for the conveyance of the land described in the declaration that there was a house on the land, and if the jury believe from the

[83] Hosley v. Brooks, 20 Ill. 116

[84] Approved in Ferguson v. Smethers, 70 Ind. 519.

[85] Williams v. McFadden, 23 Fla. 143; Gates v. Reynolds, 15 Iowa, 1; Wright v. Roach, 57 Me. 600; Page v. Wells, 37 Mich. 415.

evidence that such representation was false, the measure of plaintiff's damages will be the increase in the value of the land if there had been such a house as represented at the time of the sale, and the plaintiff is not limited to the amount which was required to place the house upon the land.[86]

V. Liability for Personal Injuries.

In general.

(986) The court instructs the jury that if you find the defendant guilty, then the plaintiff is entitled to recover her actual damages which she has sustained as the direct or proximate result of such injury, such as her loss of time, her pain and suffering, her necessary and reasonable expenses in medical and surgical aid and nursing, as the same may appear from the evidence in this cause. And if the jury find, from the evidence, that the said injury is permanent and incurable, they should also take this into consideration in assessing the plaintiff's damages.[87]

(987) The court instructs the jury that if you find for plaintiff, you will in assessing his damages, take into consideration, his age, and condition in life, the injury sustained by him, if any, and physical pain and mental anguish suffered and endured by him on account of said injury, if any, his loss of time, if any, such damages, if any, as you believe from the evidence he will sustain in the future as the direct effect of such injury, such sums as he has paid out for medical attention on account of said injury, if any, together with all the facts and circumstances in evidence in the case, and assess the damages at such sum as from the evidence you may deem proper, not exceeding $——— the amount sued for.[88]

[86] Sangster v. Prather, 34 Ind. 504.

[87] Approved in City of Chicago v. Stearns, 105 Ill. 554.

[88] Approved in Gorham v. Kansas City & S. R. Co., 113 Mo. 408; Doyle v. Missouri, K. & T. Trust Co., 41 S. W. 255; Henry v. Grand Ave. R. Co., 113 Mo. 525.

(988) The court instructs the jury that you are also to consider, as a third element of injury, for which the plaintiff would be entitled to recover, if you find for him upon the propositions of fact under the instructions given for him, the loss of time, and the disability occasioned by the alleged injury. The loss of time would consist in the actual loss from the time of the accident or injury until he was restored to health, or until the wound was healed. You should also consider the disability entailed by the accident, actual loss of his services, his inability to work, to attend to his ordinary business or trade, and you should consider the extent of his injury. To what extent does this injury deprive him from pursuing his avocation and earning the usual compensation or wages therefor? It is difficult if not impossible, to give you any definition or well defined standard from which to measure the loss or injury he may have sustained. The question as to what amount the plaintiff should be awarded rests largely in your sound discretion. You should consider, however, on this branch of loss and injury, the occupation of the plaintiff, his ability to earn wages, before the accident or injury, and the extent to which such ability to earn wages has been diminished or lost to the plaintiff. You may consider the age of the plaintiff and his reasonable expectation of life, which is shown by the evidence to be ——— years, also his habits of industry and temperance. You should also consider the contingencies of a much shorter life. The plaintiff may not live to the full period of expectancy. Also you should consider the contingencies of sickness and inability to secure employment at all times as well as the fluctuation in the value and demand of his services, and you should make a reasonable deduction for these contingencies. Whatever you may determine to be his actual injury or loss of services, or inability to earn wages, you can in no event award him a greater sum for this element of injury or loss than the present worth of such loss. The

actual outlay and expense that he has incurred in treating and nursing and medicine should be allowed him, if he is entitled to recover. It is at your discretion to give such an amount as you may think right for mental suffering and for physical pain and suffering. The actual loss of time while he was sick and unable to work should be awarded to him, but when you come to consider beyond that the disability that he has sustained, which may extend into the future, you are to determine as best you can the extent of that disability and the injury that he has sustained, or may sustain in the future. When you have determined that as near as you can in your judgments, that amount is not to be, and ought not to be, the measure of your verdict, but the present worth of it. The present worth of a given sum is arrived at by dividing a given sum by one dollar, plus the legal rate of interest, or usual rate of interest, for the given time,[89]

(989) If the jury find for the plaintiff they will assess his damages at a sum that will compensate him for the bodily injury sustained, the pain suffered, the effect of the injury on his health, according to its degree and probable duration, the expense of his sickness resulting from the injury, and of attempting to effect a cure, and the pecuniary loss sustained by reason of inability to attend to his business or profession.[90]

(990) The court instructs the jury that if they shall find a verdict for the plaintiff, then in estimating the damages they are to consider his health and condition before the injury complained of as compared with his present condition in consequence of said injury, and whether the same is in its nature permanent, and how far, if at all, it is calculated

[89] Approved in Kinney v. Folkerts, 84 Mich. 616.

[90] Approved in St. Louis, I. M. & S. R. Co. v. Cantrell, 37 Ark. 519.

to disable him from engaging in employment, for which, in the absence of such injury, he would have been qualified, and also the physical and mental suffering, if any, to which he was subjected by reason of such injury and to allow him such damages as in the opinion of the jury will be a fair and just compensation for the injury he has sustained.[91]

(991) The court instructs the jury that if you find for the plaintiff you should assess his damages at such a sum as you may believe from all the evidence will be a fair compensation to him for any pain of body or mind, for any loss of earnings, for any expenses necessarily incurred for medical attention, and for any permanent physical disability, (if any or either or all such) which you may believe from the evidence the plaintiff has sustained or will hereafter sustain, by reason of his said injuries, and which you may find from the evidence to have been directly caused by the ——— mentioned in the evidence. If you have a sympathy or prejudice in favor of or against either party, you should not allow it to influence you at all in your verdict, but in your verdict you should be guided alone by the evidence and the instructions given you by the court.[92]

(992) The court instructs the jury that in arriving at the amount of damages to be allowed in this case, if they allow any, the jury are not restricted to any procrustean rule in the mode of estimating the value of a life. The age of a man, the health he enjoys, the money he is making by his labor, his habits, are data from which the jury may argue how long he will probably live and work, and what his life is worth to his wife in its pecuniary value. This is true generally, and this is the rule laid down by which you are to estimate the damages, if you find any.[93]

[91] Approved in Philadelphia, W. & B. R. Co. v. Anderson, 72 Md. 519.

[92] Approved in Mellor v. Mo. Pac. R. Co., 105 Mo. 455. Objected to because loss of earnings were spoken of while such loss was not alleged in the declaration.

[93] Approved in Central R. Co. v. Thompson, 76 Ga. 770.

(993) The court instructs the jury that if they believe from the evidence that plaintiff received injuries caused by the negligence of defendant, its servants or employees, that it is competent for them, in ascertaining the damages to which plaintiff is entitled, to take into consideration her physical condition prior to said injury, her age, capacity for labor, and the fact as to whether she was self-sustaining or being supported by others.[94]

(994) The court instructs the jury that if you find that the defendant is liable, then you should give the plaintiff such damages as he has proved in this case, not exceeding the amount named in the declaration, and in estimating such damages you must take into consideration the permanent injury to the plaintiff, the shock to his system, his pain and anguish and a fair recompense for loss of what he might otherwise have earned, and has been deprived of the capacity for earning, by the wrongful act of the defendant. That I charge you to be the rule in estimating damages, if you find that the defendant was negligent, and the plaintiff did not contribute to his injury; you may give him a reasonable amount of compensation for his pain and anguish, and you may take into consideration what he might have earned, and has been deprived of earning by reason of the accident, in estimating your damages.[95]

(995) The court instructs the jury that in determining the amount of damages the plaintiff is entitled to recover, the jury have a right to, and they should take into consideration all the facts and circumstances in evidence before them, the nature and extent of the plaintiff's physical injuries, if any, concerning which there is any evidence in the case, the suffering of the plaintiff in body and mind, if any, resulting from such injuries, and also such prospective suffering and loss of health, if any, as the jury may believe, from

[94] Approved in Georgia Pac. R. Co. v. West, 66 Miss. 310.
[95] Mitchell v. Charleston Light & Power Co., 45 S. C. 146.

all the evidence before them in this case, he has sustained or will sustain by reason of such injuries.[96]

Proximate results.

(996) The court instructs the jury that if they believe the defendant to be guilty as alleged in the declaration, they should assess against the defendant such damages as they believe from the evidence plaintiff has sustained as a natural and proximate result of the negligence complained of.[97]

(997) The court instructs the jury that if they believe from the evidence that defendant was negligent as alleged in the declaration, and that plaintiff suffered only slight physical injuries from such negligence, though he received and suffered fright, and that subsequently plaintiff suffered from nervous prostration, and if the jury further believe from the evidence that the nervous prostration was not the result of the shock and the injury which plaintiff received through defendant's alleged negligence, then plaintiff cannot recover except for the trifling damages involved in the accident and the consequent mental suffering if any.[98]

Earning power of plaintiff.

(998) The court instructs the jury that if you believe from the evidence that at the time the plaintiff received the injuries here sued for he was receiving under a contract with ———, the sum of ——— per year, for services rendered by him, the court cannot say that the fact that plaintiff received this sum, determines that that amount is the amount of the earning power of plaintiff under the law. In determining the question of the earning power of plaintiff, you must take into consideration, the circumstances under

[96] Hannibal & St. J. R. Co. v. Martin, 111 Ill. 219. This instruction does not assume that the plaintiff is entitled to recover damages.

[97] Lovett v. City of Chicago, 35 Ill. App. 570. The substitution of the word "direct" in place of the words "natural and proximate" in the above instruction will not be error.

[98] Leigh & H. Ry. Co. v. Marchant, 84 Fed. 870.

which the plaintiff was receiving at this time this sum of ———. The fact that plaintiff had accepted the sum of ——— per year for his services is persuasive, though not conclusive evidence that the price was considered by him a fair one.[99]

Physical and mental suffering.

(999) The court instructs the jury that if you believe from the evidence that defendant was negligent as charged in the declaration resulting in injuries to the plaintiff, then in estimating plaintiff's damages you shall consider to what extent if any the plaintiff endured physical and mental suffering as a material and inevitable result of the injury.[100]

(1000) The court instructs the jury that, if they believe from the evidence that the defendant was guilty of negligence upon the occasion mentioned in the plaintiff's declaration, and that as a result of that negligence the said plaintiff was injured, they can take into consideration not only the bodily pain and suffering of the plaintiff, and the expenses she has been put to, but in addition may allow such damages as may reasonably seem to them fit, for the mental suffering and nervous shock which has resulted or may result from the said negligent act of said defendant.[101]

(1001) The court instructs the jury that if they should find for plaintiff, in assessing damages for the plaintiff they may take into consideration his bodily and mental suffering arising from his injuries and proper compensation for the loss of his arm and leg, and for his being deprived by said injuries and loss from engaging in, and following such business and calling as he might have done but for said injuries; and they may also take into consideration all the disadvantages under which he will labor for the balance of his life, by reason of said injuries and loss, but the jury

[99] McKenna v. Citizens' Natural Gas Co., 201 Pa. 146.
[100] West Chicago St. R. Co. v. Lups, 74 Ill. App. 420.
[101] Approved in Southern Ry. Co. v. Smith, 95 Va. 187.

cannot give to him an amount exceeding ———, the amount claimed in plaintiff's declaration.[102]

(1002) The court instructs the jury that if you find under the evidence and the rules of law I have given you, that the plaintiff is entitled to recover, it will be your duty to assess the amount of damages which in your judgment, he should recover. In estimating this amount, you may take into consideration expenses actually incurred, loss of time occasioned by the immediate effect of the injuries, and physical and mental suffering caused by the injuries. In addition, you may consider the professional occupation of the plaintiff, and his ability to earn money, and he will be entitled to recover for any permanent reduction of his power to earn money by reason of his injuries; and the amount assessed should be such a sum as, in your judgment, will fully compensate him for the injuries, or any of them, thus sustained.[103]

(1003) The court instructs the jury that if they believe from the evidence that the defendant company is liable in this action, then in estimating said damages they should take into account the bodily injury, if any, sustained by the plaintiff; the pain undergone, the effects on the health of the sufferer according to its degree and its probable duration as being temporary or permanent, and the pecuniary loss sustained by the plaintiff, through his inability to attend to his business affairs after his arrival at the age of twenty-one years.[104]

(1004) The court instructs the jury that if you are satisfied from the evidence that defendant was guilty of negligence as charged in the declaration, and that such negligence caused injury to the plaintiff, which is permanent in its nature and will affect plaintiff's health and physical condition

102 Chesapeake & O. Ry. Co. v. Anderson, 93 Va. 650.

103 Approved in City of Indianapolis v. Gaston, 58 Ind. 224.

104 Approved in Washington, A. & Mt. V. Electric Ry. Co. v. Quayle, 95 Va. 741.

in the future, then you shall allow the plaintiff in addition to the loss of time and expenses of nursing and medical attendance, such sum as will reasonably compensate him for pain and suffering and impairment of ability to earn a livelihood as he must suffer in the future.[105]

Recovery on account of disease.

(1005) The court instructs the jury that the burden of proof is on the plaintiff to show the extent of the alleged injuries which were caused by the ———. If the jury believe from all the evidence in the case that the plaintiff was suffering from some disease at the time of the accident, then plaintiff will not be entitled to recover damages for such disease, but would be confined to damages resulting from the injuries received because of the ———, and if the jury believe from all the evidence that the plaintiff is suffering from any disease, yet unless the jury believe from the evidence that such disease was caused by the ——— plaintiff will not be entitled to damages for such disease. Plaintiff is entitled to recover damages for whatever damages you may believe from all the evidence in the case he has sustained by the ——— if you believe from the evidence that the accident was caused by the negligence of the defendant.[106]

Predisposition to disease.

(1006) The court instructs the jury that, if they shall find a verdict for the plaintiff in estimating damages, they are to consider the health and condition of the plaintiff before the injury complained of as compared with his present condition in consequence of said injury, if they find it to be such consequence, and whether said injury is in its nature permanent; and if the jury further believe that the plaintiff's malady with which he is now troubled is the natural and proximate consequence of the injury sustained

[105] Kennon v. City of Mondovi, 73 N. W. 314.

[106] Gulf, C. & S. F. R. Co. v. McMannewitz, 70 Tex. 73.

by the defendant's negligence, then they are entitled to consider the same in awarding damages, even if they believe that at the time of the accident the plaintiff had a tendency or predisposition to the disease or trouble from which he now suffers.[107]

Injury to child.

(1007) The court instructs the jury that if they find for the plaintiff, the measure of damages is a sum of money equal to the difference between what plaintiff will earn after he is twenty-one years old and what he would have earned after his arrival at that age had he not received the injuries described in the proof, not exceeding, however, ——— dollars.[108]

(1008) The court instructs the jury that if they believe from the evidence that plaintiff's child was injured through the negligence of defendant as alleged in the declaration, in considering the damages to be recovered by the plaintiff, they shall include an allowance for loss of the minor's future services and the expenses sustained by the injury, such as those for surgical and medical attendance and maintaining the child during minority.[109]

Liability of master to parent of minor servant.

(1009) The court instructs the jury that under the law, the father is entitled to the services of his minor children during their minority. Minors cannot, without their father's consent, make legal contracts; nor without such consent engage in business for themselves. If you believe, from the evidence, that E. was a minor, under twenty-one years of

[107] Approved in Baltimore & L. Turnpike Co. v. Cassell, 66 Md. 419.

[108] Approved in South Covington & C. St. Ry. Co. v. Herrklotz, 104 Ky. 400.

[109] 2 Sedgwick, Damages, § 468; Lang v. New York, L. E. & W. R. Co., 51 Hun, 603; Gilligan v. New York & H. R. Co., 1 E. D. Smith, 453; Houston & G. N. R. Co. v. Miller, 49 Tex. 322.

age; that, without the knowledge or consent of his father, he engaged himself to defendant, and whilst so engaged received the injury alleged, then if such injury was not caused by said E.'s own negligence, plaintiff is entitled to recover for the loss of his son's services whilst under medical treatment, to his necessary expenses in perfecting a cure, including medicines and extras required in effecting a cure; also to all reasonable medical bills for which the father is liable, and to such damages as result and flow directly from the injury,—such as the diminished value of services up to the arrival at the age of majority of said E.[110]

Liability of physician for malpractice.

(1010) The court instructs the jury that the rule of damages in this case, if you find for the plaintiff and that defendant was negligent in treating the (dislocation of plaintiff's arm), is the additional pain and suffering undergone by the plaintiff in consequence of the want of reasonable care and skill in the treatment of plaintiff by the defendant if you believe from the evidence that such additional pain and suffering were incurred and any permanent injury to the (arm) shown by the evidence, if you believe from the evidence that any permanent injury was sustained because of the want of reasonable care and skill in the treatment of plaintiff by defendant.[111]

Assault and battery.

(1011) The court instructs the jury that if you find for the plaintiff under the instructions heretofore given, you will allow such damages as seem to you to be right and proper under all of the facts and circumstances in evidence. In estimating the damages you have a right to consider bodily and mental pain, if any, endured by the plaintiff, loss of time, if any, caused by such assault, if any; and his diminished

[110] Approved in Houston & G. N. R. Co. v. Miller, 49 Tex. 322.
[111] Wenger v. Calder, 78 Ill. 275.

capacity for labor, if any,—resulting directly from defendant's wrongful acts, if the evidence shows these circumstances to exist. You may also take into consideration the surgical bills, if any, which the plaintiff has incurred. It was not necessary that the amount of damages resulting from personal injuries should be proved by witnesses, but it is to be determined by you from your own general knowledge and experience. The damages above spoken of are known as "actual damages."[112]

Necessity of proof of damage—Conjecture.

(1012) The court instructs the jury, in this case, if they should find for the plaintiff, they can only allow such damages as the statute authorizes. The measure of damages it adopts is simply a compensatory one, that is, that which will make good the loss sustained. That loss must be a pecuniary loss, and be measured by that standard, and arrived at as nearly as the circumstances will admit. The mental sufferings or grief of survivors, or loss of domestic or social happiness, or the degree of culpability of the party in fault, are not proper elements in the calculation of damages. The jury cannot award exemplary or vindictive damages. They must ascertain from the evidence the pecuniary loss sustained, as nearly as they can approximate thereto, and make that good; and to do this, the testimony in the case must have furnished the data upon which the jury may calculate or approximate to an estimate of the pecuniary value of the life to the persons for whose benefit the plaintiff is entitled to damages. To ascertain this value of the life or the loss sustained, the jury is not entitled to go outside of the evidence and indulge in mere speculation and conjecture, not reasonably made from the evidence, and justifiable thereby; but must found their estimate upon such facts in proof as tend to show the pecuniary extent of the loss sustained; but to enable the jury

[112] Approved in Knittel v. Schmidt (Tex. Civ. App.) 40 S. W. 507.

to arrive at such an estimate, it is not necessary that any witness should have expressed an opinion as to the amount of such pecuniary loss, but the jury may themselves make such an estimate from the facts proved, taking into consideration the age of the deceased, and such other evidence as may afford them the means of making the estimate.[113]

VI. Aggravation or Mitigation of Damages.

Instruction under statute entitling to additional damages where there are aggravating circumstances.

(1013) The court instructs the jury that if they believe from the evidence that defendant was guilty of negligence as alleged in the declaration, and if they further believe from the evidence that there were aggravating circumstances in the act or omission of the defendant, or in the intention of defendant, then the jury may give additional damages on account of such aggravating circumstances.[114]

Mitigation—Restoration to plaintiff before suit commenced.

(1014) The court instructs the jury that although they believe, from the evidence, that the plaintiff demanded the goods in question of defendant, and that defendant had possession of the same at the time, and that the plaintiff was, in fact, the owner of said goods, and defendant refused to deliver the same to plaintiff; but plaintiff, before the commencement of this suit, repossessed himself of said goods, and after he was so repossessed, the same went into the possession of the sheriff of ——— county, and were held by such sheriff until after the commencement of this suit, by virtue of any of the executions against the plaintiff, given in evidence or otherwise, then in such case the fact that plaintiff repossessed himself of such goods should be considered in mitigation of damages, and the plaintiff would be entitled to recover only such damages as he is shown to have

[113] Approved in City of Chicago v. Major, 18 Ill. 349.
[114] Southern Railway Co. v. Harding, 101 Ga. 263.

sustained by reason of the detention by defendant of said goods, from the time defendant so refused to deliver them, until the plaintiff became so repossessed of said goods.[115]

Effect of reparation by third person.

(1015) The court instructs the jury that if they believe from the evidence that goods delivered by the plaintiff to the defendant carrier were misdelivered by defendant as alleged in the declaration to a person not entitled to receive the goods, the jury in considering the question of damages may consider the fact that plaintiff had accepted compensation from the person to whom defendant carrier delivered the goods.[116]

Effect of reception by person injured of benefits from third person on account of injury.

(1016) The court instructs the jury that plaintiff's damages cannot be reduced on account of anything plaintiff may have received from persons other than defendant acting independently of the defendant, though it is given to plaintiff on account of the injury, which plaintiff alleges to have been inflicted upon him.[117]

Injuria sine damno—Results of breach of contract averted by acts of third persons.

(1017) The court instructs the jury that if they believe from the evidence that the plaintiff, either himself or through others employed by him, constructed the building in the agreement in the declaration mentioned, in accordance with the specifications in said agreement set forth, and relying upon the contract in the declaration mentioned, then the jury shall find for the plaintiff the price therefor in said agreement stipulated to be paid by defendant to the plaintiff, al-

[115] Approved in Perkins v. Freeman, 26 Ill. 477.

[116] 1 Sedgwick, Damages, § 57; Jellett v. St. Paul, M. & M. R. Co., 30 Minn. 265.

[117] 1 Sedgwick, Damages, § 67.

though from the evidence the jury may believe that outside parties, by parol agreement, guaranteed that the plaintiff should lose nothing by his construction of said building under said agreement, and actually advanced to the plaintiff the money necessary to pay for the materials and labor employed in the construction of the said building.[118]

VII. Exemplary or Vindictive Damages.

Definition.

(1018) The court instructs the jury that exemplary damages mean damages given by way of punishment for the commission of a wrong or tort willfully. They are not the measure of the price of property or valuables, but are given as smart money in the way of pecuniary punishment, to make an example, not only for the private good of the person suing, but for the public good, by way of example, and to teach other persons not to do likewise.[119]

(1019) The court instructs the jury that if they find that plaintiff is entitled to recover any damages, and that the injury inflicted by the defendant was wanton, malicious and committed in reckless and willful disregard of the rights of plaintiff, the law allows the jury to give what is called punitive and exemplary damages, but the law blends the interests of the injured party with those of the public and permits the jury not only to give damages sufficient to compensate the plaintiff, but also to punish the defendant, and the jury should be very cautious in the application of this rule, that the law does not require them to give exemplary damages in the case, but that when the damages which plaintiff is entitled to recover in order to compensate him for injury he has actually suffered, are sufficient to punish the defendant and serve as a warning to others, the jury ought not to give more, but if they think such damages are not enough,

[118] Approved in Ferguson's Adm'r v. Wills, 88 Va. 136.

[119] Bates v. Davis, 76 Ill. 222.

then the law allows them to add such further sum as will make it sufficient for the purpose of a warning.[120]

Liability for trespass.

(1020) The court instructs the jury that if they believe from the evidence that plaintiff was in possession of the land described in the declaration, and had the same fenced, and if they believe that defendant willfully and forcibly broke the fence and entered upon the land, without any right to so enter, the jury may allow, as damages, any sum not exceeding the amount sued for, even though the sum allowed may exceed the amount of damages actually proven.[121]

(1021) The court instructs the jury that if they believe from the evidence that a trespass was committed by the defendant or his servants by his direction, in a wanton, insulting, willful and reckless manner, the jury are authorized to find exemplary or punitive damages, that is, such damages as will compensate the plaintiff for any wrong, and to punish the defendant and to furnish an example to deter others from like practices.[122]

(1022) The court instructs the jury that if they believe from the evidence that the ——— in question was the property of the plaintiff and that the defendant willfully and maliciously cut and carried away the same, the jury, in assessing the plaintiff's damages, are not confined to the actual value of the ——— taken, but may award the plaintiff such sum by way of damages as in their discretion they may deem just.[123]

Trespass against overseer of highways for removing fence.

(1023) If the jury find a verdict for plaintiffs, they should assess the actual damages sustained by plaintiffs by reason of taking down and removing of the fence and gates,

[120] Goddard v. Grand Trunk R. Co. of Canada, 57 Me. 202.
[121] Illinois & St. L. Railroad & Coal Co. v. Cobb, 68 Ill. 53.
[122] Cutler v. Smith, 57 Ill. 252.
[123] Approved in Bull v. Griswold, 19 Ill. 631.

and if the jury further find from the evidence that the act of the defendants in taking down and removing plaintiffs' fence and gates was malicious, they may assess in favor of plaintiffs and against defendants by way of exemplary damages in addition to the actual damages, such sum as the jury may believe under all the circumstances to be a just and reasonable punishment for the malice.[124]

(1024) If the jury find from the evidence that from ——— up to the time plaintiffs erected their fences and gates in ——— the portion of the land described in the petition from which defendants removed the fences and gates had been traveled daily by the public going to and from H. and the said ——— avenue was considered in the neighborhood as a public road, and if the jury further find that after the erection of said fences and gates plaintiffs were notified to remove the same, and if the jury further find that defendants in the discharge of what they believed to be a legal right, did take and remove so much only of the plaintiffs' fences and gates as stood within the limits of what they believed to be a public highway, the plaintiffs are not entitled to recover any sum in excess of the actual damages arising from the defendants' act in taking up and removing said fences and gates.[125]

Personal injuries.

(1025) The court instructs the jury that the plaintiff in this case alleges that while in the employ of defendant he received the injuries for which he sues through the negligence of the defendant in the use of certain defective appliances and machinery and if the jury find for the plaintiff, they are instructed that no exemplary or vindictive damages can be recovered, since there is no proof to warrant the jury in concluding that the use of defective appliances, if the jury

[124] Approved in McBeth v. Trabue, 69 Mo. 642.

[125] Approved in McBeth v. Trabue, 69 Mo. 642.

find that defective appliances were used, was willful or malicious. The jury, if they find for plaintiff, will be confined to the actual damages plaintiff has sustained. In estimating such damages, you may not only consider the value of that portion of the hand which was severed from the body, but also pain and anguish plaintiff may have suffered by reason of the injuries.[126]

(1026) The court charges the jury that if they find from the evidence that the accident by which the plaintiff sustained the injuries complained of was the result of the fast running of the train, and that the train was so running against the orders of defendant's superior officers and against the regulations made in that respect by defendant, then in that event plaintiff will not be entitled to recover more than his actual damages in this suit.[127]

Assault and battery.

(1027) The court instructs the jury that if malice has been shown by the evidence, or may be reasonably inferred from the conduct of the defendant as shown in evidence, you may, in your discretion, give exemplary damages by way of punishment to the defendant, and for the purpose of setting a wholesome example to others.[128]

Liability of carrier for ejecting passenger.

(1028) The court instructs the jury that if they find from the evidence that the defendant carrier was guilty of wrongfully ejecting the plaintiff from its train of cars, and that the assault on plaintiff was unprovoked, was willful or malicious, and was perpetrated in a rude and insulting manner, evincing an intent to wound and injure the plaintiff's feelings and bring him into contempt and disgrace in the estimation of the public, then the case is one jus-

[126] Lowrimore v. Palmer Mfg. Co., 60 S. C. 153.

[127] Approved in Texas Trunk R. Co. v. Johnson, 75 Tex. 158.

[128] Approved in Knittel v. Schmidt (Tex. Civ. App.) 40 S. W. 507.

tifying the imposition by the jury of exemplary or vindictive damages as a punishment for the offense, and the jury are instructed that in estimating the proper amount of such damages, they may take into consideration, the position, character, standing, influence and feelings of the plaintiff.[129]

Liability for malicious prosecution.

(1029) The court instructs the jury that if they find for plaintiff and if the jury should allow plaintiff anything on account of vindictive damages, you may in your discretion, in assessing the amount of such damages, take into consideration the proper and reasonable expenses of defending the criminal prosecution instituted by defendant and complained of in this action.[130]

(1030) The court instructs the jury that if you believe from the evidence that defendant instigated this prosecution, or refused bail, because of a personal ill will or because of any sinister motive towards this plaintiff, then you may find for the latter not only such damages as will compensate him for the injuries he has sustained but such damages as will punish the defendant for an act so grossly in violation of his duties.[131]

False imprisonment.

(1031) The court instructs the jury that if you find that defendants did not act in good faith, and were actuated by ill will or malice, and took advantage of what occurred, you may go beyond actual compensation and award such other damages, usually called exemplary damages or smart money, as you may think proper under the circumstances. There is no limit to it, except the reasonable discretion of the jury. You have a right, if you find that the defendants acted ma-

[129] Chicago, B. & Q. R. Co. v. Bryan, 90 Ill. 126.

[130] Bell v. Matthews, 37 Kan. 686.

[131] Approved in Grohman, by next friend, v. Kirschman, 168 Pa. St. 189.

liciously to go beyond the actual compensation, and award such damages as you think right and proper.[132]

Action against saloonkeeper under civil damage act.

(1032) The court instructs the jury that if they believe from the evidence that the defendant in good faith instructed his employees not to sell or furnish liquor to ———, the husband of the plaintiff, and if the jury further believe from the evidence that the defendant himself refused to furnish liquor, but that the employees of the defendant through mistake or caprice furnished the liquor to ———, the jury will have no right to give exemplary damages or smart money.[133]

(1033) The court instructs the jury, as a matter of law, that in a suit brought by a wife or widow to recover for an injury to her means of support caused by the intoxication of her husband, produced, in whole or in part, by intoxicating liquor sold or given to him by the defendant or defendants (if such facts are shown by the evidence), if it further appears, from the evidence that in consequence of such act of causing such intoxication, and as a proximate result or consequence of such intoxication so caused, she has sustained actual and real damages to her means of support, then the jury may, in addition to the actual damages shown, give exemplary or vindictive damages, unless it shall appear, from the evidence, that such liquor was sold or given to the husband, not by the defendants, but by their agents or servants, and that the defendant or defendants had forbidden his or their said agent or agents to sell or give liquor to such husband, and did not know of or permit such sale or gift when

[132] Brushaber v. Stegemann, 22 Mich. 265.

[133] Brantigam v. White, 73 Ill. 561. It would be error in this case not to positively instruct the jury that they would have no right to give exemplary damages, and it would be error to frame the instruction in such a manner that they would be allowed to consider the facts set out in the instruction upon the question of exemplary damages.

made, in which case the defendants would not be liable to exemplary or vindictive damages.[134]

(1034) The court instructs the jury that under our statute, if the jury believe from the evidence that the defendant in selling liquor to plaintiff's husband acted in willful disregard of her rights, the jury may allow exemplary damages. Exemplary damages are punitive in their character and designed to punish the defendant for some positive wrong he has inflicted upon the plaintiff or for some very gross neglect of her rights in furnishing liquor to her husband at the time alleged in the declaration and the jury must exercise a sound discretion in determining the amount they will award.[135]

(1035) The court instructs the jury that if you find the plaintiff entitled to actual damages under the law, it is your duty to add thereto an amount as exemplary damages. Usually these damages are discretionary with a jury; that is, the jury may allow them or not, as they think best. In this case, under our statute, if actual damage is given, exemplary damage must be added; but of the amount to be given you are the judges, keeping in view the fact that they are given as a punishment for the wrong done, and as an example that may prevent others from doing a like wrong.[136]

CHAPTER XLV.

DEATH BY WRONGFUL ACT.

In general, 1036, 1037.
Self-defense as justifying homicide, 1038-1040.
Apprehension of bodily harm to another as justifying homicide, 1041.
Contributory negligence, 1042.

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[134] Approved in Betting v. Hobbett, 142 Ill. 72.
[135] Larzelere v. Kirchgessner, 73 Mich. 276.
[136] Approved in Thill v. Pohlman, 76 Iowa, 638.

Damages recoverable in general, 1043-1046.
Recovery for neglect in selling poison, 1047.
Earnings, mental sufferings of survivors, loss of society, and superintendence of education of children, 1048-1055.
Expectancy of life and probable earnings, 1056-1061.
Determination of present value, 1062, 1063.
Pecuniary or physical condition of survivors as affecting amount of recovery, 1064-1066.
Recovery by next of kin, 1067, 1068.

In general.

(1036) The court instructs the jury that if you should consider that the defendant was in default in this case, then of course you would have to consider the question of compensation. As has been stated to you by both counsel originally there was no right of action to a survivor in a case of this character. The person who was injured had a right to damages for pain and suffering and anguish which he had gone through. The legislature, however, have changed the old common law, and the representative, the widow, now has a right to bring a suit for the pecuniary loss which she sustained. Now of course in all these cases nobody pretends that these companies act maliciously—do this on purpose. They operate entirely through their agents, and if their agents are negligent, they are undoubtedly obliged to suffer for it just as an individual would be. Just as a man driving your carriage, if he negligently ran into some one else, you would be responsible for what he did, because he was your servant, and your agent and performing the duty for which you had employed him. Therefore there ought to be a reasonable compensation.[1]

(1037) The court instructs the jury that if they believe, from the evidence, that on the ——— day of ———, 19—, D. came to his death, while in the exercise of ordinary care for his own safety, in the manner and by the means set forth in the amended declaration filed herein; and if the jury

[1] Approved in Connor v. Electric Traction Co., 173 Pa. 602.

further believe from the evidence, that the death of said D. was caused by the negligence of the defendant, ——— company, as charged in the declaration; and if the jury further believe from the evidence that the said D. left him surviving a widow and children, as charged in the declaration, and that such widow and children, by the death of the said D., have been and are deprived of their means of support, then, in law, the plaintiff is entitled to recover.[2]

Self-defense as justifying homicide.

(1038) The court instructs the jury that if they believe from the evidence that the defendant had no reasonable cause to apprehend that deceased intended to take defendant's life, or do him any other great bodily harm, and that thereupon the defendant fired the pistol shot in revenge, or in a reckless and vindictive spirit, then there is no self-defense in the case, and the jury cannot find for the defendant on that ground.[3]

(1039) The court instructs the jury that although you may believe from the evidence that deceased took hold of the defendant and held him, and may believe from the evidence that he attempted to follow him, when released, with the intention of again taking hold of him, yet that would not justify the defendant in taking his life, unless the jury believe from all the evidence before them, that the defendant had reasonable cause to believe that the deceased was then about to take his life, or do him some other great personal injury.[4]

(1040) The court instructs the jury that to justify the killing of W. by the defendants or either of them, there must have been some act then done by him or some words then spoken coupled with his acts sufficient to produce upon the minds of the defendants or either of them a reasonable

[2] Approved in Economy Light & Power Co. v. Stephen, 187 Ill. 137.
[3] Approved in Nichols v. Winfrey, 90 Mo. 403.
[4] Approved in Nichols v. Winfrey, 90 Mo. 403.

apprehension that they or one of them, were in immediate danger of losing life or of suffering serious bodily injury at the hands of W. and the killing must have been done while such danger or apparent danger existed, for if the killing was done after such or apparent danger had ceased, then it would be illegal and wrongful.[5]

Apprehension of bodily harm to another as justifying homicide.

(1041) The court instructs the jury that if they find that ———, the deceased, was related to the equitable plaintiff as charged in the declaration, and that on the ——— day of ———, 19—, said ———, the deceased, and ——— (a clerk in the employ of defendant) were engaged in a fight near the defendant's store at ———, and that the defendant came out of his store and seeing said fight ran up to within a short distance of said ———, deceased, and fired his pistol toward him and shot and killed him, then their verdict must be for the plaintiff, unless they are satisfied by preponderating proof that said shooting was done for the purpose of preventing the said ———, the deceased, from killing said ——— (a clerk in the employ of defendant) or inflicting upon him great bodily harm, and that the facts at the time of the shooting were such as to warrant reasonable belief in his mind in the exercise of his judgment that there was no other reasonably possible—or at least probable—means of preventing said injury; and that his act was one of necessity.[6]

Contributory negligence.

(1042) The court instructs the jury that if they believe from the evidence that ———, the husband of plaintiff, was guilty of any negligence which contributed to the injury which resulted in his death, then the jury must find a verdict for the defendant, although they may further believe that

[5] Approved in Wallace v. Stevens, 74 Tex. 559.

[6] Approved in Tucker v. State, to use of Johnson, 89 Md. 471.

the plaintiff's husband was killed by negligence as charged in the petition.[7]

Damages recoverable in general.

(1043) The court instructs the jury that if the jury find for the plaintiff, they will assess her damages at such a sum as in their judgment will be a fair and just compensation to her for the loss of her husband, not exceeding the sum of $5,000.[8]

(1044) The court instructs the jury that if they should believe from the evidence that the defendant was guilty of the wrongful act, neglect or default as charged in the plaintiff's declaration, and that the same resulted in the death of ———, then the plaintiff is entitled to recover in this action for the benefit of (designate the persons for whose benefit the statute authorizes the action to be brought) such damages as the jury may deem, from the evidence and proofs, a fair and just compensation, with reference to the pecuniary injuries resulting from such death (to the class of persons previously designated) not exceeding ——— (if there is a statutory limit).[9]

(1045) The court instructs the jury that if they believe from the evidence that the plaintiff is entitled to recover, in estimating the damages the jury should find the sum with reference:

First. To the pecuniary loss of the widow and child, at a sum equal to the probable earnings of the deceased, considering his age, business, capacity, experience, habits, energy, and perseverance during his probable life.

[7] Approved in Le May v. Missouri & P. R. Co., 105 Mo. 361.

[8] Approved in Browning v. Wabash W. Ry. Co., 124 Mo. 55.

[9] Chicago, B. & Q. R. Co. v. Payne, 59 Ill. 534; Chicago, M. & St. P. Ry. Co. v. Dowd, 115 Ill. 659. It is not necessary in the above instruction to say anything as to the care required of the deceased or to in any way go into the question of negligence and contributory negligence.

Second. In ascertaining the probability of life reference may be had to the scientific tables on that subject.

Third. They may consider the loss of his care, attention, and society to his widow and child.

Fourth. They may add such sum as they deem fair and just by way of solace and comfort to his widow for the sorrow, suffering, and mental anguish occasioned by his death, provided they do not find over ten thousand dollars.[10]

(1046) The court instructs the jury that if they should believe from the evidence that defendant was guilty of the wrongful act, neglect or default, as charged in the plaintiff's declaration, and that the same resulted in the death of plaintiff's intestate, then plaintiff is entitled to recover in this action for the benefit of the next of kin of said intestate, such damages as the jury may deem, from the evidence and proofs, a fair and just compensation with reference to the pecuniary injuries resulting from such death, to such next of kin, not exceeding ———.[11]

Recovery for neglect in selling poison.

(1047) The court instructs the jury that, if you find for plaintiffs, you will find for them such damages as you may think proportionate to the injury resulting from the death of the child not to exceed, however, the sum expended in an effort to have her relieved from the effects of the morphine and the reasonable value of the services of the child from the time of her death until she would have attained the age of twenty-one years, not to exceed the sum sued for. Neither physical nor mental suffering of the deceased child nor the mental anguish of the parents in consequence of the death of their child, are items or elements of damages to be considered by you. And the value of the child's services during the period of her minority (if you should find for plaintiffs), is to be ascertained by you as best you can from your own

[10] Approved in McDonald v. Norfolk & W. R. Co., 95 Va. 98.

[11] Chicago, B. & Q. R. Co. v. Payne, 59 Ill. 534.

judgment, good sense and sound discretion and the evidence before you. If ——— (the druggist clerk) did not sell the drug to ——— at all, or if he did sell it to him, yet he sold to him the article called for, then the plaintiffs cannot recover. The burden of proof is on the plaintiffs to show that the drug was purchased from defendants and that quinine was asked for and that it was sold and represented to be quinine.[12]

Earnings, mental sufferings of survivors, loss of society, and superintendence of education of children.

(1048) In ascertaining the amount of damages plaintiff is entitled to recover in this case, if any, the jury will take into consideration:

First. By fixing the same at such sum as would probably be equal to the earnings of the deceased, taking into consideration the age, business, capacity, and experience and habits, health, energy and perseverance of the deceased, during what would probably have been his lifetime if he had not been killed.

Second. By adding thereto the value of his services in the superintendence, attention to and care of his family, of which they have been deprived by his death.

Third. The physical pain of the deceased, as well as the mental suffering of the surviving members of his family.

Fourth. The loss to his family in reference to his moral and intellectual training.[13]

(1049) The court instructs the jury that if you find for the plaintiff, and find that the next of kin of deceased has sustained any damages by reason of his death, in estimating such damages the jury cannot consider the mental sufferings or grief of the surviving kindred, or loss of domestic or social happiness, or culpability of the defendants, but the jury, if they find for the plaintiff, must be governed solely by the

[12] Approved in Brunswig & Co. v. White, 70 Tex. 504.

[13] Approved in Baltimore & O. R. Co. v. Few's Ex'r, 94 Va. 82.

actual pecuniary loss that the next of kin of deceased have sustained by reason of his death.[14]

(1050) The court instructs the jury that if they believe from the evidence that the defendant was guilty of the wrongful act charged in the plaintiff's declaration, and that the same resulted in the death of ———, then the plaintiff is entitled to recover such damages as the jury may deem from the evidence and proof a fair and just compensation therefor, having reference only to the pecuniary injuries resulting from said death to the plaintiff and (such other persons as the statute entitles to share in the damages) not exceeding the amount claimed in the declaration. Sorrow or grief for the deceased, or any pain caused to the next of kin by the manner of his death, is not to be considered by the jury and the pecuniary value of the life of deceased to (the persons designated in the statute as entitled to bring the action) is all for which damages can be assessed.[15]

(1051) The court instructs the jury that the plaintiff's damages can only be estimated for the pecuniary loss suffered by the death of deceased, without taking into account the mental anguish or bereaved affections of plaintiff, and that the jury must make their estimate of such pecuniary damage from the facts proved, and that it is not necessary that any witness should have expressed an opinion as to the amount of such pecuniary loss.[16]

(1052) The court instructs the jury that if they believe from the evidence that ——— came to his death by the wrongful act of the defendant as alleged in the declaration in estimating the pecuniary injury which (the persons designated in the statute as entitled to the damages) have sustained, the jury have a right to take into consideration the support of the said (widow and minor children of the de-

[14] Approved in Wabash R. Co. v. Smith, 162 Ill. 583.
[15] Pennsylvania Co. v. Marshall, 119 Ill. 399.
[16] City of Chicago v. Major, 18 Ill. 349.

ceased) and the instruction, and physical, moral and intellectual training, of the minor children of the deceased, and also the ages of the said minor children and the pecuniary condition of the said minor children and widow of the deceased in determining the amount of damages, if they believe from the evidence that the deceased left a widow and minor children.[17]

(1053) The court instructs the jury that if they should find for the plaintiff, in ascertaining his damages they may consider the loss of the services of the deceased to his father until he would have become twenty-one years of age; compensation for the loss of his care, attention, and society to his father. And they may add such further sum as they deem fair and just by way of solace and comfort to his father for the sorrow, suffering and mental anguish occasioned to him by his death. But the entire damages must not exceed $10,000.[18]

(1054) The court instructs the jury that in assessing damages they are to estimate the reasonable probabilities of the life of the deceased ——— and give the equitable plaintiffs such pecuniary damages as the jury may find that they have suffered or will suffer as the direct consequence of the death of the said ———; that for his children these prospective damages may be estimated to their majority; and as to the widow to such probability of life as the jury may find reasonable under the circumstances.[19]

(1055) The court instructs the jury that if they find, under the first instruction, a verdict for the plaintiff, then in assessing the damages they are not to take into consid-

[17] Illinois Cent. R. Co. v. Weldon, 52 Ill. 290. This instruction only to be given, of course, in case there is evidence showing that the deceased was fitted to furnish to his children the instruction or moral, physical or intellectual training.

[18] Approved in Richmond & M. R. Co. v. Moore's Adm'r, 94 Va. 493.

[19] Approved in President, Managers, and Company of the Baltimore & R. Turnpike Road v. State, 71 Md. 573.

eration the mental pain and suffering of the plaintiff's cestui que use in consequence of the death of the child, and are not to give against the defendants, punitive, vindictive or exemplary damages, but in estimating the damages they are confined to the pecuniary damage sustained by the plaintiff and are to give such a sum as they may believe from all the evidence in the case will be adequate compensation for the loss of her son's services from the time of his death to the period when, if he had lived, he would have attained the age of 21 years.[20]

Expectancy of life and probable earnings.

(1056) The court instructs the jury that if you find for the plaintiff, you will look to the evidence and determine from that how much you will find. You will, in arriving at a conclusion, look to the evidence as to the age of plaintiff's husband, the probable length of his life, the amount that he earns or would probably earn during his life, and the state of his health.[21]

(1057) The court instructs the jury that if you believe from the evidence that the capacity of plaintiff's husband would be decreased by reason of advancing years, then it would be your duty to diminish the amount that you may find for the plaintiff accordingly.[22]

(1058) The court instructs the jury that in making this calculation as to the amount plaintiff would be entitled to recover, you would have the right and it would be proper for you to consider whether or not the capacity of the plaintiff's husband to labor and earn money would have, by reason of advancing years, decreased, and if you believe under the evidence that it would have decreased in the same proportion

[20] Approved in State of Maryland, use of Coughlan, v. Baltimore & O. R. Co., 24 Md. 84; Baltimore & O. R. Co. v. State of Maryland, use of Coughlan, Id.

[21] Approved in Georgia R. Co. v. Pittman, 73 Ga. 325.

[22] Approved in Georgia R. Co. v. Pittman, 73 Ga. 325.

as you believe his capacity to labor and earn money would have diminished, in the same proportion would it be proper and right that your verdict and finding would be diminished.[23]

(1059) The court instructs the jury that if under all the evidence the jury find for the plaintiff, the proper measure of damages is the pecuniary loss suffered by her and her two children; and that loss is what her husband would have probably earned by his labor in his business during his lifetime, and which would have gone for the benefit of the plaintiff and her two children, taking into consideration his age, ability, and disposition to labor, and his habits of living and expenditure.[24]

(1060) The court instructs the jury that if you find for the plaintiff, you will estimate the damages to which he is entitled; and in so doing, you will not allow anything for pain and suffering of deceased, nor wounded feelings, nor grief of his relatives, nor anything by way of exemplary damages or punishment of defendant, nor infer any fortuitous circumstances whereby the income or fortune of deceased might be increased or improved had he lived. This suit is brought only to recover a pecuniary loss, namely, what the estate of the deceased had lost in consequence of his untimely death, and no more. And, in determining what amount you will allow, you should take into consideration the age of the deceased, his occupation, the wages he was receiving, the condition of his health, his ability, if any, to earn money, his expenditures and habits as to industry, sobriety and economy, the amount of property which he had accumulated at the time of his death, if any, the probable duration of his lifetime, and all these in connection with all the evidence before you, throwing light on this question and

[23] Approved in Georgia R. Co. v. Pittman, 73 Ga. 325.

[24] Approved in Huntingdon & B. T. R., etc., Co. v. Decker, 84 Pa. 419.

determine therefrom the probable pecuniary loss to the estate caused by his death and allow the plaintiff such sum and such only as will compensate the estate for such loss.[25]

(1061) The court instructs the jury that the Carlisle tables have been offered in evidence, but you are not to regard such tables as proving that plaintiff is to recover for forty and three-fourths years of life. You are to bear in mind that ——— was liable to die at any time, and that there was no certainty that he ever would have lived until he was twenty-one years old. You are not to presume that he would be diligent in acquisition of property or successful in saving what he might acquire.[26]

Determination of present value.

(1062) The court instructs the jury that the measure of damages in this case is the present value of the amount of money which the plaintiff and the minor children, during the continuance of the deceased's life would have received from her had she lived. The present valuation of a sum of money payable in the future is what that sum is worth if paid presently—paid now. For example the present value of $1.00 at 6% at the end of one year is found by dividing $1.00 by $1.06; and the present value of $1.00 at the end of two years is found by dividing $1.00 by $1.12.[27]

(1063) The court instructs the jury that if you shall find for the plaintiff, it would not be proper to find the amount that you may believe from the evidence that he earned each year, and then add those amounts together and find a verdict for that sum, but it would be your duty to find the value of the annuity. That is to say, what sum paid to him now in cash would represent the yearly payments if the deceased had

[25] Approved in Spaulding v. Chicago, St. P. & K. C. R. Co., 98 Iowa, 205.

[26] Approved in Andrews v. Chicago, M. & St. P. Ry. Co., 86 Iowa, 677.

[27] Approved in Nelson v. Lake Shore & M. S. R. Co., 104 Mich. 582.

lived. You will perceive that any recovery that may be had would be paid now, and that you arrive at what sum you should pay him by first determining the length of time he would live, and this sum, as it would have been paid to his wife, as she would have been entitled to it yearly, it would be improper to give her the amount that you may find that he earned yearly added together. A book has been introduced in evidence to aid you in making a calculation, in order to find out the present value of the annuity. You can use the rules in that book, or you can take any other rules or information that you may possess, that refers to making calculations under the rules of law that I have given you, and from all the information, the best information you can command, find the present value of the annuity. As an illustration and as an illustration only, if you believe from the evidence that the plaintiff is entitled to recover, suppose, for example, that she is entitled to recover on the basis of five hundred dollars, or one hundred dollars, say one hundred dollars, and yet if you find that the one hundred dollars would not be due, as an illustration, for five, eight or nine years, you should find an amount, its present value to date, as put at interest would make the one hundred dollars at the end of five, eight or nine or any other number of years you may believe from the evidence the husband of plaintiff would probably have lived.[28]

Pecuniary or physical condition of survivors as affecting amount of recovery.

(1064) The court instructs the jury that the pecuniary circumstances of the plaintiff at the time of and since the death of deceased, cannot increase or diminish the amount of damages which the plaintiff is entitled to recover in the suit, in case the jury find the issue for the plaintiff, and if the jury so find, they are instructed in the assessment of

[28] Approved in Georgia R. Co. v. Pittman, 73 Ga. 325.

damages to disregard all the testimony as to the pecuniary circumstances of the plaintiff at the time of and since the death of deceased.[29]

(1065) The court instructs the jury that if they believe from the evidence that the plaintiff at the time of the death of deceased, was a cripple or was disabled through some deformity or some mental condition, and if the jury further believe that such physical or mental weakness had existed from the time of plaintiff's birth, such fact cannot increase or diminish the amount of damages which the plaintiff will be entitled to recover in this suit in case the jury should find the issue for the plaintiff, and if the jury should find the issue for the plaintiff, they are instructed in the assessment of damages to disregard all the testimony in the case, as to such physical or mental defects.[30]

(1066) The court instructs the jury that the pecuniary circumstances of the plaintiff and her infant daughter, at the time of and since the death of said ———, cannot increase or diminish the amount of damages, which the plaintiff is entitled to recover in this suit, in case the jury find the issue for her, and if the jury so find, they are instructed, in the assessment of damages, to disregard all the testimony as to the pecuniary circumstances of said plaintiff and her infant daughter, at the time of and since the death of said ———.[31]

Recovery by next of kin.

(1067) The court instructs the jury that if they find for the plaintiff, in estimating the damages sustained by the next of kin of the deceased by reason of his death, the jury can only estimate the damages to the brothers and sisters of deceased at such a sum as the evidence shows they have sustained by the death of deceased, and can only estimate the damages to

[29] Illinois Cent. R. Co. v. Baches, 55 Ill. 379.

[30] Illinois Cent. R. Co. v. Baches, 55 Ill. 379.

[31] Approved in Illinois Cent. R. Co. v. Baches, 55 Ill. 379.

the father of deceased upon the basis of what the son's services would have been worth to his father from the date of the injury to the time he would have arrived at the age of twenty-one years, deducting therefrom the costs and expenses of the father in his support and maintenance during that time; and if the evidence does not show the ages of said brothers and sisters, nor that they were receiving support from him or were in condition to require it, then the jury can only estimate the damages to said brothers and sisters at a nominal sum."[32]

(1068) The court instructs the jury that if they believe from the evidence that the deceased (the wife of plaintiff) met her death through the wrongful act of the defendant as charged in the declaration, in assessing damages, while they must assess with reference to pecuniary injuries sustained by the next of kin in consequence of the death of the wife, they are not limited to loss actually sustained at the precise period of her death, but may include also prospective loss, provided they are such as the jury believe from the evidence, will actually result to the next of kin as the proximate damages arising from the death of the wife.[33]

CHAPTER XLVI.

DEEDS.

Enforcement of conditions of deed by grantor, 1069-1071.
Notice of unrecorded deed, 1072.

Enforcement of conditions of deed by grantor.

(1069) The court instructs the jury that this action is brought to recover the farm in question by the plaintiffs, the heirs at law of S., deceased. The defendant H. claims title under a deed executed by S. and wife, dated ———. This

[32] Approved in Wabash R. Co. v. Smith, 162 Ill. 583.
[33] Tilley v. Hudson River R. Co., 29 N. Y. (2 Tiff.) 252.

deed, if it was executed by the grantors and delivered to the grantees, showed upon its face a sufficient consideration to pass the title to the defendant H., if accepted by the defendant H., and was binding upon the parties thereto at the time of its delivery and acceptance; that if the defendant H. had failed to perform the conditions of the deed, then and in that case the deed became void, and the plaintiffs would be entitled to recover; but if the jury were satisfied from the evidence that the conditions of the deed had, in all respects, been substantially performed by the defendant H., then the plaintiffs were not entitled to recover. If the jury believed S. was satisfied with his treatment and so expressed himself, it would be a waiver of a strict performance of that which might otherwise be insisted upon as a forfeiture, if the evidence would warrant it. If defendant H. intended in good faith to perform all the conditions of the deed, and has substantially performed them, it will be sufficient, for the law under such circumstances leans against forfeitures, but it is your duty to see whether there has been a substantial or intentional neglect on the part of H. to keep the conditions of the deed; and if there has been such neglect the plaintiffs are entitled to recover.[1]

(1070) The court instructs the jury that to entitle plaintiffs to recover, inasmuch as the defendant had given considerable evidence tending to show performance, and inasmuch as the effect of non-performance was a forfeiture of the title, under the deed, there ought clearly to appear from the evidence a breach on the part of the defendant of the condition mentioned in the deed described in the declaration to be kept and performed by the defendant.[2]

(1071) The court instructs the jury that if they believe from the evidence that the plaintiff, the grantor in the deed described in the declaration, was in fact satisfied and ex-

1 Spaulding v. Hallenbeck, 39 Barb. 79.
2 Spaulding v. Hallenbeck, 39 Barb. 79.

pressed himself satisfied with the manner in which he was treated, it was to that extent a waiver of a strict performance by the defendant of the condition of the deed.[3]

Notice of unrecorded deed.

(1072) The court instructs the jury that the information which will charge a person with knowledge of a prior unrecorded deed ought to be of that character that a prudent person, by the exercise of reasonable and ordinary diligence could, upon inquiry and investigation, ascertain the fact that a prior conveyance has been made.[4]

CHAPTER XLVII.

DEPOSITARIES.

Loss of gratuitous deposit—Measure of damages, 1073, 1074.
Failure to redeliver—Liability, 1075.

Loss of gratuitous deposit—Measure of damages.

(1073) The court instructs the jury that if the jury shall find from the evidence that the plaintiff on or about (the 22d day of January, 1866), deposited for safe-keeping with defendants (thirteen United States bonds for $1,000 each, bearing interest payable in gold on the first days of May and November in each year); that the defendants were then doing business in the city of Washington, as bankers and brokers, under the name and firm of M. & Co., and the said deposit was made with them as such bankers and brokers and was gratuitously deposited, for the keeping of which they were not to receive any compensation, and that such bonds were lost and abstracted from the possession and keeping of the defendants so that the plaintiff did not and could not recover the same, and that said loss and abstraction occurred

[3] Spaulding v. Hallenbeck, 39 Barb. 79.
[4] City of Chicago v. Witt, 75 Ill. 211.

through the failure of the defendants to use such care in the custody and keeping of such bonds as persons of common prudence in their situation and business usually bestow in the custody and keeping of similar property belonging to themselves, then the plaintiff is entitled to recover, and that the measure of damages is the value of the said bonds at the time of said demand and also the value of the gold interest thereon on the (first days of November, 1866, May, 1867, November, 1867, May, 1868), less sums the jury shall find were actually paid to and realized by the plaintiff in cash paid and money received from securities placed in her hands, with interest on the value of the several instalments of gold interest due (in each six months as aforesaid) and interest on the principal sum from the (first of November, 1868).[1]

(1074) The court instructs the jury that if the jury shall find from the evidence that the plaintiff did on or about (the 22d of January, 1866), deposit with the defendants for safekeeping (thirteen bonds of the United States for $1,000 each bearing interest payable in gold on the first day of May, and the first day of November, in each year), and that said deposit was made on the terms of (the agreement set out in the paper marked "A" which has been given in evidence) and that the defendants were then doing business (in the city of Washington) as bankers and brokers (under the name and firm of M. & Co.), and that afterwards, on or about (the first day of May, 1866), the plaintiff demanded such (bonds) from the defendants, and they were not then, and have not since, been returned to the plaintiff, then the plaintiff is entitled to recover, unless the jury shall further find that the (bonds) in question were lost or abstracted from the possession and keeping of the defendants and that such loss or abstraction did not occur from any failure on the part of said defendants to use such care as persons of common prudence

[1] Approved in Maury & Osbourn v. Coyle, by Coyle, his guardian, 34 Md. 235.

in their situation and business usually bestow in the custody and keeping of similar property belonging to themselves and that the measure of damages is the value of the (bonds) at the time of the said demand and also (the value of the gold interest thereon on the first days of November, 1866, May, 1867, November, 1867, May, 1868 and November, 1868), less the sum the jury shall find were actually paid to and realized by the plaintiff in cash paid to her, and money received by her from securities placed in her hands; with interest on the value (of the several instalments of gold interest due in each six months as aforesaid) and interest on the principal sum from the first day of November, 1868.[2]

Failure to redeliver—Liability.

(1075) The court instructs the jury that if they believe from the evidence that the plaintiff deposited with the defendant the United States bonds described in the receipt introduced in evidence by the plaintiff of the par value of $———, and that after making such deposit, the defendant gave a receipt to the plaintiff acknowledging that the bonds had been left with him as a special deposit and that afterwards and prior to the commencement of this suit the plaintiff demanded of the defendant the bonds, and that the defendant refused to deliver them up or to settle therefor, and that the defendant never returned the bonds, then the plaintiff is entitled to recover the value of the bonds at the time of such demand and refusal together with the interest less such interest as had been received by the plaintiff.[3]

[2] Approved in Maury & Osbourn v. Coyle, by Coyle, his guardian, 34 Md. 235.

[3] Approved in Cushman v. Cogswell, 86 Ill. 62.

CHAPTER XLVIII.

DIVORCE.[1]

Cruelty, 1076-1078.

Cruelty.

(1076, 1077) The court instructs the jury that if they believe from the evidence in the case that the defendant has been guilty of extreme and repeated cruelty, under the instructions above given, they shall give a verdict for plaintiff, unless they find that such cruelty was occasioned by the complainant's own misconduct, and that it is not sufficient to show misconduct, in no way proportioned to the cruelty of the defendant, and which could not have caused it.[2]

(1078) The court further instructs the jury, for the complainant, that if they believe from the evidence, that during the existence of the marriage relation between the parties to this suit, the defendants made threats against the life or person of the complainant, and that he constantly carried a revolver in day time, and kept such revolver under his pillow at night; and that such threats were repeated from time to time, by defendant, either to the complainant or to other persons, who communicated them to complainant; and, if the jury further believe, from the evidence, that the defendant was guilty of repeated acts of personal violence towards the complainant; and if the jury further believe, from the evidence, that the complainant, from such threats and acts of defendant, had a reasonable apprehension of bodily hurt from

[1] It is deemed unwise to attempt to give many forms under this title, because, first, divorce trials are not usually to a jury, second, the causes being defined by statute precedents would be of local value only, third, the differences are ofttimes so narrow that confusion and mistake would result from the collection of many forms. The precedents here given are under a statute making "extreme and repeated" cruelty a cause for divorce.

[2] Von Glahn v. Von Glahn, 46 Ill. 134.

the defendant, which shows a state of personal danger incompatible with the duties of married life, then such threats and acts amounted to extreme and repeated cruelty, under the statute.[3]

CHAPTER XLIX.

DOWER.

Determination of amount, 1079, 1080.

Determination of amount.

(1079) The court instructs the jury that it is their duty to ascertain from the evidence in this cause the annual value of the dower of the complainant in the land in which she has in this suit been adjudged to be entitled to dower, and that by such annual value is meant the sum of money per year which is equal to one-third of the net productive value of said land after deducting from such, one-third of the annual taxes, repairs and insurance, and one-third of the interest of all incumbrances that were on any of the land at the time of the death of ———.[1]

(1080) The court instructs the jury that it is their duty in this cause to inquire into and ascertain the damages to which the complainant is entitled for the detention and refusal to assign reasonable dower; that such damages are to be inquired into and determined since the time of the filing of the petition in this cause; that the complainant is entitled as such damages to one-third of what the jury shall find from the evidence to have been the yearly value of the rent of the premises in which she has dower, for the period that has accrued subsequent to the filing of the petition in this cause, deducting therefrom one-third of the annual taxes as-

[3] Approved in Tantum v. Tantum, 5 Ill. App. 598.

[1] Approved in Walker v. Walker, 5 Ill. App. 289.

sessed on said land during the same period, and also one-third of the interest on any incumbrances on a parcel of said land for the same period and paid by the defendants or any of them, and also one-third of all insurance and repairs so paid for any building and improvements in which the said complainant has dower.[2]

CHAPTER L.

DRUGGISTS.

Violation of statute regulating sales—Negligence of clerk, 1081.
Contributory negligence in use of drug, 1082.
Necessity that use of drug be proximate cause of sickness, 1083.

Violation of statute regulating sales—Negligence of clerk.

(1081) The court instructs the jury that if in the putting up of this drug (and I say to you that a part of the putting up is the matter of labeling it), this statute was violated, then there was negligence on the part of F. which would make the defendant, if you find that F. was his agent, liable for the injury resulting therefrom, unless negligence of others contributed as I will hereafter explain.[1]

Contributory negligence in use of drug.

(1082) The court instructs the jury that notwithstanding defendant's neglect to label, and that plaintiff was ignorant of the drug being acid, yet, if you believe from the evidence that he, before the application to his ear, became possessed of knowledge or any facts which would put an ordinarily prudent man on inquiry as to the character of the drug, and nevertheless used it, he was guilty of contributory negligence, and may not recover.[2]

[2] Approved in Walker v. Walker, 5 Ill. App. 289.
[1] Approved in Davis v. Guarnieri, 45 Ohio St. 470.
[2] Approved in Fisher v. Gollady, 38 Mo. App. 531.

Necessity that use of drug be proximate cause of sickness.

(1083) The court instructs the jury that if you find from the evidence that croton oil was by defendant administered to plaintiff in dangerous quantity, as is alleged, then you will consider whether or not it was the proximate cause of plaintiff's sickness and injury, as alleged; and if you find that it was not the proximate cause thereof, or if the plaintiff was sick at the time of administering the croton oil, if any was administered, and the same did not increase the sickness or pain, or the duration thereof, then you should find for the defendant.[3]

CHAPTER LI.

DRUNKARDS.

What constitutes intoxication, 1084.
What constitutes one a common drunkard, 1085.

What constitutes intoxication.

(1084) The court instructs the jury that a person is intoxicated in contemplation of law, where the use of intoxicating liquors has affected his reason or his faculties or has rendered him incoherent of speech or has caused him to lose control in any manner or to any extent of the action or motions of his person or body.[1]

What constitutes one a common drunkard.

(1085) The court instructs the jury that the defendant is charged in the complaint to have been a common drunkard from ——— to ———. Upon this charge he is presumed to be innocent; that is, he is presumed not to be a common drunkard; but the jury are not to be instructed that because it is proved that a defendant was drunk five times in

[3] Approved in Rabe v. Sommerbeck, 94 Iowa, 656.
[1] Approved in State v. Huxford, 47 Iowa, 16.

four months, and no proof is given of his condition the remainder of the four months, it is to be presumed that he was sober and not intoxicated during the remainder of the time. The question is, whether the facts proved satisfy the jury beyond a reasonable doubt, that during the time specified in the complaint he was a common drunkard. One way to state it is this: Can the facts proved be true, on the supposition that he was not, during that time, habitually a drunkard?[2]

CHAPTER LII.

DURESS.

When will render contract voidable, 1086-1088.

When will render contract voidable.

(1086) The court instructs the jury that a contract made under compulsion may be avoided by the party by whom it was executed. Compulsion, however, to have this effect, must amount to what the law calls duress. Mere angry or profane words, or strong earnest language, cannot constitute such compulsion as will amount to duress, or enable a party to be relieved from his contract. There may, however, be duress by threats. Duress by threats does not exist, wherever a party has entered into a contract under the influence of a threat, but only where such threat excites, or may reasonably excite, a fear of some grievous wrong, as bodily injury or unlawful imprisonment.[1]

(1087) The court instructs the jury that to constitute duress which would avoid the deed, it is not necessary that the threats be of physical injury alone; but if the plaintiff, the wife of T., was induced to execute the deed by the treats of T., her husband, that he would separate from her as her hus-

2 Com. v. McNamee, 112 Mass. 285.

1 Approved in Adams v. Stringer, 78 Ind. 180.

band, and not support her, it is duress and would avoid the deed. The threats must be such as she might reasonably apprehend would be carried into execution, and the act must have been induced by the threats. It is not necessary that the threats be made at the time, or immediately before signing, if it was within such time, and the circumstances satisfy you that the threat or its influence properly continued and influenced the plaintiff.[2]

(1088) The court instructs the jury that if the payee of the note surrendered it to the maker voluntarily, in liquidation of a just debt then due from him to them, the note was fully canceled by the surrender; but if the note was obtained from ——— wrongfully and unlawfully by threats and duress, it was not canceled by the surrender, and the plaintiff can maintain an action for the amount due thereon, if she is the owner thereof.[3]

CHAPTER LIII.

EJECTMENT.

Necessity that plaintiff recover on the strength of his own title, 1089, 1090.
Acquisition of title and adverse possession, 1091.
Defenses—Outstanding title, 1092.
Same—Forfeiture for nonpayment of taxes, 1093.
Same—Adverse possession, 1094.
Burden of proof, 1095.

Necessity that plaintiff recover on the strength of his own title.

(1089) The court instructs the jury that the right of the plaintiffs to recover in this case rests on the strength of their own title, and they cannot recover by showing defects in the title of the defendant.[1]

2 Approved in Tapley v. Tapley, 10 Minn. 458.
3 Approved in Koehler v. Wilson, 40 Iowa, 183.
1 Buntin v. City of Danville, 93 Va. 200.

(1090) The court instructs the jury that if they believe from all the evidence that the boundaries of the ——— grant to plaintiff are in such doubt and uncertainty that they cannot say whether or not they embrace the land in controversy, they must find for the defendants.[2]

Acquisition of title and adverse possession.

(1091) The court instructs the jury that the law assumes that those in possession of land are rightfully in possession, and he who claims that the persons in possession are unlawfully in possession must satisfy the jury by a preponderance of the evidence that he has a good title and a better title than the defendant. The plaintiff must recover upon the strength of his own title.[3]

Defenses—Outstanding title.

(1092) The court instructs the jury that an outstanding title in another to defeat the action of ejectment must be a present, outstanding, operative, and available legal title on which the owner could recover against either of the contending parties if asserting it by action.[4]

Same—Forfeiture for nonpayment of taxes.

(1093) The court instructs the jury that in an action of ejectment the general rule is that a plaintiff must recover upon the strength of his own title and not upon the weakness of the defendant's title; for the reason that the defendant is not required to give up possession until the true owner demands it and the right to show in defense a substituting outstanding title rests upon the same principle. So if the title of the plaintiff, ———, to the ——— acres of land claimed by him in this suit became forfeited to the state of ——— for any five consecutive years before bringing this suit for the nonpayment of taxes thereon, or for the failure

[2] Reusens v. Lawson, 96 Va. 285.

[3] Approved in Sutton v. Clark, 59 S. C. 440.

[4] Reusens v. Lawson, 91 Va. 226.

of the said ——— or any one under whom he claims to have said lands entered on the land books of any county in which part thereof is situated where they are located for the purpose of taxation, then the said plaintiff cannot recover in this action and the jury must find for the defendant.[5]

Same—Adverse possession.

(1094) The court instructs the jury that although they may believe from the evidence that the land in controversy is covered by the deeds under which the plaintiff claims, yet if they further believe from the evidence that the defendants and those under whom they claim have been in the honest, peaceable, continuous, and adverse possession of said land, paying taxes on the same, under color of title, for ——— years prior to the institution of this suit, they must find for the defendants.[6]

Burden of proof.

(1095) The court instructs the jury that if they believe from the evidence that the ——— grant, under which the plaintiff claims includes within its exterior boundaries lands which were excepted from the operation of said grant, then it is incumbent on the plaintiff to show, by preponderance of evidence, that the lands of the defendants are not within the excepted lands.[7]

[5] Approved in Davis v. Living, 50 W. Va. 431.
[6] Approved in Reusens v. Lawson, 91 Va. 226.
[7] Reusens v. Lawson, 96 Va. 285.

CHAPTER LIV.

ELECTRICITY.

Liability for accidental contact with live wire, 1096.
Degree of care on account of dangerous nature of element, 1097.
Act of God, 1098, 1099.
Proximate cause of injury, 1100.
Sudden fracture of wire, 1101.
Contributory negligence, 1102.
Knowledge of fracture, 1103.
Duty to repair after fall of wire, 1104, 1105.

Liability for accidental contact with live wire.

(1096) The court instructs the jury that if they believe from the evidence that the defendant was negligent, according to the definitions given above, and that, in consequence of such negligence, the plaintiff accidentally came in contact with wires charged with electricity, operated and controlled by defendant, and was injured thereby, then the plaintiff would be entitled to recover.[1]

Degree of care on account of dangerous nature of element.

(1097) The court instructs the jury that the degree of care, which the law requires, in order to guard against injury to others, varies greatly according to the circumstances of the case, and if the jury believes that electricity was the power used by the defendant in its business, and is a highly dangerous agency to life, unless exercised with constant and extreme care, then, to such extent, a high degree of care in its supervision, management and use, is required of defendant, and a failure on its part to exercise such high degree of care would be negligence.[2]

[1] Approved in Mitchell v. Charleston Light & Power Co., 45 S. C. 146.

[2] Approved in Mitchell v. Charleston Light & Power Co., 45 S. C. 146.

Act of God.

(1098) The court instructs the jury that if they find that the wire was broken by some object such as a slate or tile hurled upon it by a storm, the wire being in good condition, the break would be attributed to the act of God. I charge you that; but it would be the duty of the defendant to use precautionary measures not to allow the wire to remain on the streets. The negligence complained of in this case is that the wire remained on the streets after it was broken; and if it remained there longer than a reasonable time, and could have been removed sooner by a due exercise of care, then that was negligence, and the defendant would be responsible.[3]

(1099) The court instructs the jury that an injury is said to be caused by an act of God, when it results immediately from a natural cause without the intervention of man, and could not have been prevented by the exercise of prudence, diligence, and care by the party charged with liability, by reason of his negligence in permitting said injury to occur; and a defendant so charged with liability, if he invokes the act of God as a defense, has the burden of proof upon him to show, not only that the act of God was the cause but that it was the entire cause of the injury, because it is only when the act of God is the entire cause of the injury, and said injury could not have been prevented by the exercise of prudence, diligence, and care by defendant, that the said defendant can be shielded. I charge you that, as I have already explained to you. For instance, the law would require the company to guard against ordinary wind storms when he erects an electric wire in a public thoroughfare.[4]

Proximate cause of injury.

(1100) The court instructs the jury that there is no evi-

[3] Approved in Mitchell v. Charleston Light & Power Co., 45 S. C. 146.

[4] Approved in Mitchell v. Charleston Light & Power Co., 45 S. C. 146.

dence of any other cause of death of plaintiff's intestate, except from the electricity coming from the wire of the defendant; therefore if the jury find from the evidence that the death of the intestate was caused by the current of the electricity passing into his body from the charged wire of the defendant, the jury will find that the negligence of defendant was the proximate cause of the death of intestate of plaintiff.[5]

Sudden fracture of wire.

(1101) The court instructs the jury that the law does not require impossibilities of any person, natural or artificial, nor does it require that the defendant should have ready for service at every moment and every point of exposure, an adequate force to overcome a sudden fracture of wire or any other like casualty in the shortest possible time. All that it can be required to do in this connection is to maintain an efficient system of oversight, and to be prepared with a competent and sufficient force ready to furnish, within a reasonable time, a proper remedy for all such casualties, defects, and accidents, as from experience there was any reasonable ground to anticipate might occur.[6]

Contributory Negligence.

(1102) The court instructs the jury that although they may believe from the evidence in this cause that the said defendant company was guilty of negligence in the manner of constructing or maintaining its electric wire over and above the track of the ——— Railway Company, still plaintiff had no right to attempt to pass from one car to another while the cars were passing under the said wire if in so doing he increased the danger of an accident from the said wire, and if from the evidence in the case they believe that the said plaintiff did attempt to pass from one car to another while passing under said wire, and by so doing did increase the danger and

[5] Approved in Mitchell v. Electric Co., 129 N. C. 166.

[6] Approved in Mitchell v. Charleston Light & Power Co., 45 S. C. 146.

chance of the accident, he cannot recover in this case, and the jury must find for the plaintiff.[7]

Knowledge of fracture.

(1103) The court instructs the jury that if you believe that the defendant company was notified by telephone from ——— office that there was trouble with its wires, and failed to take immediate steps to investigate such trouble and rectify the same, if trouble existed; and if a sufficient time between the notice to the defendant of the trouble to its wires and the accident to the plaintiff for its investigation and attention had elapsed, and thereafter, by reason of the failure of the defendant to attend to its said wires, such wire or wires charged with electricity, hung suspended over the scene of the accident so as to become dangerous to persons on the street, then the defendant would be guilty of negligence. I charge you that, which, in plain words, is, that if the company was notified that its wires were down, and did not take steps in a reasonable length of time to repair them, it would be guilty, if an accident occurred, in not repairing their wires in a reasonable length of time.[8]

Duty to repair after fall of wire.

(1104) The court instructs the jury that if they find that between the time when the defendant received the notice of the breaking of the wire and at the time at which the plaintiff came in contact therewith, there was not reasonable time in which the defendant could have repaired the wire or could have removed it out of the way of persons using the streets, then their verdict must be in favor of the defendant.[9]

(1105) The court instructs the jury that the defendant was entitled to a reasonable time after the fall of the wire,

[7] Approved in Danville Street Car Co. v. Watkins, 97 Va. 713.

[8] Approved in Mitchell v. Charleston Light & Power Co., 45 S. C. 146.

[9] Approved in Mitchell v. Charleston Light & Power Co., 45 S. C. 146.

to repair it or remove it out of the way of persons using the street, and if you find that the injury to the plaintiff occurred before the expiration of such reasonable time, then the plaintiff is not entitled to recover anything in this action. If they removed or repaired the wire in a reasonable time, and were not negligent in allowing it to lie upon the streets, then they would not be liable, because want of due care would not be established.[10]

CHAPTER LV.

EMINENT DOMAIN.

Measure of damages for taking or damaging property, 1106-1111.
Purposes for which land may be used—Value fixed as of what time, 1112.
Price obtained for land adjoining that taken, 1113.
Liability of railroad company, 1114-1119.
Recovery by abutting owner for occupation of street by railroad, 1120-1130.
Recovery by abutting owner for construction of viaduct in street, 1131.
Cautionary instruction, 1132.
Form of verdict, 1133.

Measure of damages for taking or damaging property.

(1106) The court instructs the jury that while it is proper for witnesses in making their estimate of damages to be allowed the defendant, to take into consideration any use to which they believe from the evidence the property in question may be profitably appropriated, yet the jury are not bound to base their verdict upon the supposition that it would be appropriated to a use other than that to which it is now devoted.[1]

[10] Approved in Mitchell v. Charleston Light & Power Co., 45 S. C. 146.

[1] Snodgrass v. City of Chicago, 152 Ill. 600; Phillips v. Town of Scales Mound, 195 Ill. 353.

(1107) The court instructs the jury that they are not to consider the price which the property would sell for under special or extraordinary circumstances, but its fair cash market value if sold in the market, under ordinary circumstances, for cash, and not on time, and assuming that the owners are willing to sell and the purchaser is willing to buy.[2]

(1108) The court instructs the jury that just compensation for the taking and damaging of property means the payment of such sum of money as will make the defendant whole, so that on receipt by the defendant of the compensation and damages awarded he will not be poorer by reason of his property being taken or damaged.[3]

(1109) The court instructs the jury that the owner of property to be condemned is entitled to its actual value for its highest or best use to which the property, in the condition it was at the filing of the petition, could be put, and if the jury believe from the evidence, that the property described in the petition and sought to be condemned had an actual value for a specified use, and that such property was devoted and adapted to such use, then the owner is entitled to such value. In this case, the property sought to be condemned has a market value and the jury are instructed that they are to find from the evidence what such market value is, and the jury are instructed that the market value of the property sought to be condemned is the same as the value of the property for said specified use, if the jury find from the evidence that the property had a value for a specified use.[4]

(1110) The court instructs the jury that no remote or

[2] Brown v. Calumet River Ry. Co., 125 Ill. 600; Calumet River Ry. Co. v. Moore, 124 Ill. 329; Kiernan v. Chicago, S. F. & C. Ry. Co., 123 Ill. 188; Phillips v. Town of Scales Mound, 195 Ill. 353.

[3] Metropolitan West Side El. Ry. Co. v. Stickney, 150 Ill. 362; Phillips v. Town of Scales Mound, 195 Ill. 353.

[4] Chicago & E. R. Co. v. Jacobs, 110 Ill. 414.

speculative damages can be allowed in the action, but only such as are the natural and proximate effect of defendant's acts.[5]

(1111) The court instructs the jury that you have had the benefit of viewing this property and you have heard the testimony of all these experts and it will be for you to say after carefully weighing this testimony, whether this property was damaged by the opening of C. street in 19—, or whether it was benefited. If the property was damaged by the opening of C. street and if its market value was less immediately after the opening, than it was immediately before, then you ought to give the plaintiffs damages for the difference. If, however, after careful consideration you find that this property was not damaged at all by the opening of C. street at that date, or that it was benefited, then your verdict ought to be for defendant. The court instructs the jury if they find that plaintiffs are entitled to a verdict and if they believe from the evidence that the property in question was depreciated by the opening of the street on ——— and if the plaintiffs are entitled to any compensation by reason of the opening of ——— street through their property in ———, then the jury may take into account that the plaintiffs have lost the use of the amount they are entitled to as compensation for a period of ——— and if the jury find a verdict for plaintiffs they may in determining the compensation allow damages for the detention by the defendant of the payment of such compensation.[6]

Purposes for which land may be used—Value fixed as of what time.

(1112) The court instructs the jury that in this case it is proper for you to take into consideration the proximity of this land to and its contact with the city of ———. And it is proper for you to take into consideration any fact which

[5] Approved in Blesch v. Chicago & N. W. Ry. Co., 48 Wis. 168.
[6] Provident Life & Trust Co. v. Philadelphia, 202 Pa. 78.

may tend to add a value to that land. If any part of it was then valuable as building lots, and that fact added a value to the land, it is proper for you to take that into consideration, and if the location and construction of the defendant's railroad across this land destroyed it in part, or took away any part of this land which might have had or had value for that purpose, it is proper for you to take that fact into consideration. It is not proper for you in determining the value, or the amount of damages sustained by the plaintiff, to take the estimate of any one as to how many lots might be laid out upon the premises, and what these lots might have sold for in the event of their being sold. That would be fixing a measure of damages not as of the date of entry but as of a future time, but your duty is to fix the measure of the damages sustained by the plaintiff at the time of the entry, and as we have said, anything that then added value to the land and any injury then sustained, must be taken into consideration by you.[7]

Price obtained for land adjoining that taken.

(1113) The court instructs the jury that you are entitled to consider what the petitioner sold the tract adjoining the property taken by the defendant for, but you are not bound to act upon that alone, and you ought not to act upon that alone, but in connection with the other evidence. The petitioner had the right if he wished to give that land to the defendant, or sell it for what it was worth, or less than it was worth, or more than it was worth, if he could get it, so what the petitioner got for the said adjoining tract is not binding upon you in determining the value of the property taken and made the subject of this suit, but the price obtained for the adjoining tract is only an item of evidence in arriving at what you believe from the whole evidence

[7] Approved in Reiber v. Butler & P. R. Co., 201 Pa. 49.

to be the actual value or the actual market value of the property now in question.[8]

Liability of railroad company.

(1114) The court instructs the jury that plaintiff's action is for damages caused to his property by the construction and operation of railroad tracks of defendant in the immediate vicinity of the plaintiff's property. The special damages claimed are on account, or by reason of, the construction of defendant's road, the jarring of his house occasioned by passing trains, and from the smoke, ashes and cinders deposited upon plaintiff's premises by the engines of defendant, and damages resulting from other causes incident to the operation of a railway, and the court instructs the jury that plaintiff cannot recover any damages occasioned by the operation of defendant's road, such as damages occasioned by smoke, ashes or cinders deposited upon the plaintiff's premises, except for the time laid in and covered by the declaration, that is, from the time of construction of the tracks to the commencement of this suit, to-wit, on the ———, and such damages, if any, they must find from the evidence, and the court instructs the jury that while the depreciation of the value of the property resulting from mere inconvenience in approaching or leaving the property, or the noise and confusion in the vicinity, cannot be included in the damages, yet the depreciation of the value of plaintiff's property resulting from the jarring of plaintiff's building, and the throwing of cinders, ashes and smoke upon the plaintiff's premises, may be included in the damages.[9]

(1115) The court instructs the jury, on the part of the defendant, that the said defendant is entitled to compensation for land taken for right of way of petitioner over and across the lands of said defendant, and the jury should in

[8] West v. Milwaukee, L. S. & W. R. Co., 56 Wis. 318.

[9] Chicago, M. & St. P. R. Co. v. Hall, 90 Ill. 42.

the amount of such compensation at what they believe, from the evidence, to be a fair value for the land so taken.[10]

(1116) The court instructs the jury that if they believe, from the evidence, that the defendant is entitled to damages by reason of the construction and use of said petitioner's railway over and across defendant's lands, then the jury should so find, and, in ascertaining the amount of such damages, should deduct therefrom such amount, if any, as the jury believe, from the evidence, the said defendant will be benefited by reason of the construction and use of said railway over and across said land of said defendant.[11]

(1117) The court instructs the jury that if you find from the evidence that the plaintiff's farm consisted of about ——— acres of improved lands, and the right of way of defendant cut the same in such a manner as to injure the value of the same by throwing it open and dividing it into pieces, you are at liberty to consider such circumstances and the effect upon the land, if any, by reason of the location upon the land of the railroad, and of the inconvenience directly caused by the railway, in determining the effect the same would have upon the market value of the lands, and it is the depreciation in the market value of the premises which is the true measure of damages and which you are to allow for, and not the matters which would cause such depreciation.[12]

(1118) The court instructs the jury that the interruption of plaintiff in the use and cultivation of his land, or any inconvenience he may have been put to in its cultivation and use as a live stock farm, or otherwise, according to his peculiar taste in farming, since the appropriation of the right of way, if any, cannot be considered by the jury

[10] Peoria, A. & D. R. Co. v. Sawyer, 71 Ill. 361.

[11] Peoria, A. & D. R. Co. v. Sawyer, 71 Ill. 361.

[12] Approved in Hartshorn v. Burlington, C. R. & N. R. Co., 52 Iowa, 613. Plaintiff was landowner.

as forming an element of damages in his favor, and your inquiry must be confined to the marketable value of plaintiff's land before and after the right of way was appropriated, taking into account, in this connection, the number of acres taken for the right of way, the manner of its location, the way his land is cut by the railroad and the like, so as to be able to estimate the true market value of his land, affected by the location of the railroad before and after such location; the difference in the market value of the land affected by the appropriation of the strip for the right of way before, and then again after the right of way is asserted, will form or constitute his true measure of damages.[13]

(1119) The court instructs you that respondent railway company cannot recover any damages against the petitioner in this case on account of having to stop and start their respective trains at the proposed crossings of the different railroad tracks, in order to comply with the law of the state, and the jury will find no damages against the petitioner on account of any annoyance, damage, delay or expense caused simply by so being compelled by law to stop before passing any of the proposed crossings.[14]

Recovery by abutting owner for occupation of street by railroad.

(1120) The court instructs the jury that if the running of defendant's cars and locomotives on the street in front of plaintiff's premises created smoke and cast it on the premises, so as materially to impair the reasonable use and enjoyment thereof, they might allow plaintiff reasonable compensatory damages therefor. The damages you find, if any, on this ground, must be the actual damages, and you must say what the plaintiff ought to have in money, and what the

[13] Approved in Hartshorn v. Burlington, C. R. & N. R. Co., 52 Iowa, 613. Plaintiff was landowner.

[14] Approved in Peoria & P. U. R. Co. v. Peoria & F. R. Co., 105 Ill. 110.

defendant ought to pay, if anything, in view of the discomfort or annoyance to which the plaintiff has been subjected by reason of such smoke during the period between the construction of this railroad in front of his premises and the commencement of this action, avoiding all speculative and fanciful annoyances as grounds of damages. If you find that any damages were sustained by the plaintiff from these causes, you may include it in your estimate of the depreciation of the annual value of the premises under other instructions.[15]

(1121) The court instructs the jury that they may consider the purposes for which the premises were used, whether for the business or the residence of plaintiff and his family, and the extent to which the obstruction and operation of the railroad, by impairing plaintiff's right of property in the street, interfered with the use and enjoyment of the premises; but that they are to consider the business transacted by the plaintiff on the premises only for the purpose of determining the annual rental value.[16]

(1122) The court instructs the jury that the measure of these damages is the difference between the annual value of plaintiff's premises with the railroad constructed and operated as it was, and what such annual value would have been had not the railroad been on said street during that time; and that in determining such diminution in the annual value, they may consider the manner in which the road was built along said street in front of said premises, the manner in which and the extent to which it was used and occupied at that place by defendant's cars and locomotives, the situation of the premises in reference to that portion of the road, and the effect which defendant's occupation and use of that portion of the road had upon the reasonable use and enjoyment of the premises and of the improvements thereon.[17]

[15] Approved in Blesch v. Chicago & N. W. Ry. Co., 48 Wis. 168.
[16] Approved in Blesch v. Chicago & N. W. Ry. Co., 48 Wis. 168.
[17] Approved in Blesch v. Chicago & N. W. Ry. Co., 48 Wis. 168.

(1123) The court instructs the jury that if defendant's said right of property was materially impaired, they must allow him the damages resulting therefrom from the date of the building of the road in front of his premises until the commencement of the action.[18]

(1124) The court instructs the jury that at the time of the construction of the road plaintiff had a vested private right of free access to and egress from his said lots and the buildings thereon, over and along ——— street in front of the lots, "as the same was and would have continued to be according to the mode of its original use and appropriation by the public," and that this was a right of property which could not be materially impaired or destroyed without plaintiff's consent, except upon payment to him of due compensation; and therefore, if defendant's road changed the mode of the original use of the highway, or if it was thereby appropriated by the public to new vehicles and methods of transportation, so as to materially impair plaintiff's said right, he was entitled to recover such damages as would compensate him for the injury.[19]

(1125) The court instructs the jury that the testimony shows that the effect upon the plaintiff's property rights, as hereinbefore defined, would have been the same whether the railroad actually encroached upon the western side of the street or not. You will therefore assess the damages, if any you find, according to the foregoing instructions, however you may find upon the question of encroachment, which you will determine as a separate question. That is to say, if you find the plaintiff has been injured in his property right, under the foregoing instructions, you will determine the damages for such injury upon the principles hereinbefore stated, whatever you may think as to whether the railroad is upon the western side of the center of the street. You

[18] Approved in Blesch v. Chicago & N. W. Ry. Co., 48 Wis. 168.
[19] Approved in Blesch v. Chicago & N. W. Ry. Co., 48 Wis. 168.

will then determine whether the railroad, or any portion of it, is on the western side of the center of the street; and, if so, how much.[20]

(1126) The court instructs the jury that if the plaintiff enjoyed any peculiar benefits from the railroad being on this street, such benefits must be deducted from his damages; but that benefits common to the whole community are not to be considered.[21]

(1127) The court instructs the jury that if the construction and operation of defendant's road in front of plaintiff's premises had depreciated their annual value, the jury can not apportion the damages for these injuries according to the width of the strip actually taken and occupied, but must award damages to compensate plaintiff for the whole amount of injuries sustained.[22]

(1128) The court instructs the jury that plaintiff had a right to put any lawful improvements on the property after the railroad was built on his land in the street; and that, if any such improvements were made, they are to be considered in determining the subsequent rental value of the premises.[23]

(1129) The court instructs the jury that in no event must the damages exceed the sum which would be obtained by determining the difference between the annual rental value of the property with the railroad constructed and operated as it was, and what that value would have been if there had been no railroad on P. street during that time.[24]

(1130) The court instructs the jury that the damages allowed to plaintiff must not in any case exceed the market value of his premises when the railroad was constructed.[25]

[20] Approved in Blesch v. Chicago & N. W. Ry. Co., 48 Wis. 168.
[21] Approved in Blesch v. Chicago & N. W. Ry. Co., 48 Wis. 168.
[22] Approved in Blesch v. Chicago & N. W. Ry. Co., 48 Wis. 168.
[23] Approved in Blesch v. Chicago & N. W. Ry. Co., 48 Wis. 168.
[24] Approved in Blesch v. Chicago & N. W. Ry. Co., 48 Wis. 168.
[25] Approved in Blesch v. Chicago & N. W. Ry. Co., 48 Wis. 168.

Recovery by abutting owner for construction of viaduct in street.

(1131) The jury are instructed that the plaintiffs herein are not entitled to recover because of any alleged injury resulting to the fair cash market value of said premises because of any alleged diversion of traffic off from ——— street, in front of said premises, by reason of the construction of said viaduct, even if they believe, from the evidence, that any such diversion of traffic has in fact resulted from such cause.[26]

Cautionary instruction.

(1132) The court instructs the jury that in assessing damages, if any, however, they must be careful not to include any item more than once, and must give plaintiff actual compensation for his injury, but no more.[27]

Form of verdict.

(1133) The court further instructs the jury that the form of their verdict in this case may be as follows: We, the jury, find for the defendant, and fix the compensation for land taken for right of way at ——— dollars. We further fix the damages sustained by the defendant, by reason of the construction and use of petitioner's railway over defendant's said land, at ——— dollars; filling the blanks in accordance with the foregoing instructions.[28]

[26] Approved in City of Chicago v. Spoor, 190 Ill. 340.
[27] Approved in Blesch v. Chicago & N. W. Ry. Co., 48 Wis. 168.
[28] Peoria, A. & D. R. Co. v. Sawyer, 71 Ill. 361.

CHAPTER LVI.

ESTATES OF DECEDENTS.

Settlement of administrator's accounts, 1134-1136.
Replevin against one claiming right of possession as administrator, 1137.
Liability of estate for services rendered decedent, 1138-1142.

Settlement of administrator's accounts.

(1134) The court instructs the jury that if you believe from the evidence that anything has been paid upon the share of the widow, and received by her upon that share, then the administrator should have credit for such payment, and it does not make any difference whether he immediately turned around and borrowed the money from the widow. The true test is what was the understanding of the parties and if you believe from the evidence that either by the terms of the contract, or by their tacit acquiescence afterwards, that the money of the estate was so used, then it should be allowed to the administrator, but if it was paid without her direction or consent either tacit or expressed, then it should not be allowed. As a general rule an administrator is not allowed to loan the money of the estate. It is his duty to get the money and distribute it. Loans are sometimes permitted where all the parties interested acquiesce. And in this case, if the widow received her share from the administrator either by the payment of money to her, or by an arrangement to do so, and so treated it or any portion of the estate as her share or part of her share, and then authorized the administrator to loan it, he would have a right to do so.[1]

(1135) The court instructs the jury that no loan by the administrator should be allowed him in his account unless you find that the circumstances were such as to warrant you

[1] Approved in Ward v. Tinkham, 65 Mich. 695.

in coming to the conclusion that the arrangement by which the money was loaned was with the understanding that it was to be treated as the property of the widow herself. If you believe from the evidence that such an arrangement as that was made, then it should be allowed in his account here, and she would have to seek her remedy elsewhere for loss occasioned by injudicious conduct.[2]

(1136) The court instructs the jury that the administrator has the burden of proof to establish his right to have items allowed him in his account. The law requires good faith on the part of the administrator, and you are not to imply a consent to treat money as an advancement unless it is made to appear plainly that such was the intention of the party, and it must also appear that the arrangement if tacit was made with the full understanding on the part of the widow. There must on the part of the administrator be shown a freedom from fraud and a freedom from concealment.[3]

Replevin against one claiming right of possession as administrator.

(1137) The court instructs the jury that the defendant's plea of property in himself as administrator and not in his individual right has the force and effect in this action of pleading property in a third person, and if the jury believe from the evidence that the defendant obtained the lawful possession of the property sought to be recovered in this suit in his trust capacity as an administrator of the estate of ——— as part and parcel of the personal effects of the said decedent, and sold the same as in said trust capacity, and if the jury believe from the evidence that the right of the property in the ——— sought to be recovered in the suit

[2] Approved in Ward v. Tinkham, 65 Mich. 695.

[3] Approved in Ward v. Tinkham, 65 Mich. 695.

was in the estate of the said decedent then the plaintiff is not entitled to recover in this action.[4]

Liability of estate for services rendered decedent.

(1138) The court instructs the jury that the plaintiff sues to recover a sum of money which he says is due him for six years' services, rendered one ———, who has since deceased. The services were rendered the last six years before his death. And the simple question is, did he render such, or any services to the testator, under such circumstances as to entitle him to pay, and if so, how much? That there were some services rendered does not seem to be denied. The amount of services, however, seems to be disputed. The plaintiff claims for but six years, and, of course, can recover for no more. In order to ascertain whether he is or not entitled to recover, it becomes important, in the first place, to ascertain whether he rendered the services, and also the kind of services, for he would be entitled to recover a reasonable compensation, considering the circumstances. He has proved to you that he has rendered some services, how much, of course, is for you to decide. Having found he has rendered more or less services, he will be entitled to recover a reasonable compensation for these services, unless the proof satisfies you from some reason or other, that he is not entitled to recover.

(1139) The court instructs the jury that the real point in the case is, has the defendant satisfied you that the plaintiff performed these services, be they more or less, without any expectation of pay, other than what he was to receive by will as a gift, or performed them as a gratuity. If he did so perform them, he is not entitled to recover. If he did not so perform them, he is entitled to recover.

(1140) The court instructs the jury that the ordinary rule of law is, when services have been rendered to another, which

[4] Rose v. Cash, 58 Ind. 278.

are valuable to him by his consent or with his knowledge, and without any objection on his part he is liable for such services rendered. For the law implies a promise on the part of the one receiving services to pay for them. So that if this case rested here there would be no question about his right to recover. But the defendant says, that these services were rendered without any expectation of pay; that he rendered them with the expectation of receiving a portion of the testator's property by his will. The burden of proof is upon the defendant, to satisfy you of this fact. If they were rendered as a gratuity, and so understood by the parties, it would be too late for him to turn round and ask pay for them. That there was a legacy to this plaintiff, is not denied and the will has been introduced before you. This will is in writing and, therefore, it becomes my duty to give it a construction as matter of law. We find in this will an absolute, unconditional legacy to the plaintiff, whether of more or less value is not material in this case. The legal construction is, that it was a gift, nothing more and nothing less.

(1141) The court instructs the jury that if it had been intended as a payment, then there should have been a condition attached to the legacy, providing that the legatee should receive it in payment, or full discharge of all claims against the estate. Then if the plaintiff had received it, he could not recover in this suit. But there is no such condition attached, it is a bare, naked legacy, and is, therefore, a naked gift. The result is, there is no proof in the will that this was to be payment or compensation in any way for services rendered. If one person renders service to another, and that other voluntarily makes him a present, he may have various reasons for doing it, but the person rendering the service is just as much entitled to receive his compensation as though he had not received the gift. Whether the legacy is of little or great value is of no consequence. Then it is

said that these services were rendered as a gratuity, with the expectation of receiving in some way, a legacy for them. If the services were rendered as a gratuity then he would not be entitled to recover; for no person, after having made a present to another, can afterwards, in a court of law, recover compensation for it. Therefore, if these services were rendered as a gratuity, plaintiff not expecting or intending to claim pay for them, although he may have been expecting favors in return, he cannot recover. It therefore becomes important under this state of the case for you to examine the testimony and see how far it will sustain such a view of the case. The burden of proof is upon the defendant to satisfy you upon this point. It is possible you may view that will as of some weight on this ground; that if it was to be a compensation for his services, or a gratuity rendered in consideration of a gratuity having been received from this plaintiff, whether the testator would not have been likely to mention it in the will. He has left it a mere naked gift.[5]

(1142) The court instructs the jury that you will have to determine from this testimony whether whatever services this plaintiff rendered to the deceased lady were the acts of courtesy, kindness and friendship, which all of us receive and many of us render every day of our lives or whether they were that kind of services which was the result of a contract and which entitled her to compensation. Of course, if you find that whatever she did for this deceased lady was simply the ordinary, kindly and courteous acts of people living in the same house that were rendered without expectation of receiving pay and without expectation of being paid for, your verdict ought to be for the defendant, and the plaintiff ought not to receive any verdict, but if, on the other hand, her services were the result as is claimed, of a contract, then she is entitled to receive for the period that

[5] Approved in Rumrill v. Adams, 57 Me. 565. The foregoing instructions (1138-1141) are to be taken as a series and as such were approved.

is not barred by the statute of limitations such compensation as you believe her services are reasonably worth, according to the market price of such services.[6]

CHAPTER LVII.

ESTOPPEL.

Reliance on representations, 1143, 1144.
Failure to claim right, 1145, 1146.
Knowledge by party to be estopped, 1147.

Reliance on representations.

(1143) The court instructs the jury that if you find from the evidence that plaintiff when he was informed of the matter disclaimed having any interest in the property, and you believe from the evidence that defendant relied on such disclaimer, and you further believe from the evidence that defendant relying on such disclaimer bought the premises, and that injury will result to him if plaintiff be permitted now to claim the property, then there is an estoppel in pais and plaintiff may not claim such property.[1]

(1144) The court instructs the jury that if the conversation that took place at the time, by her language and her acts, amounted to a representation on her part, made by her with the intention of influencing this man B. to make the sale upon the idea or impression produced by those statements, that J. was the owner of the stock, or if, from what transpired at that time, he would so reasonably believe, and the statement would therefore influence him to make the sale to J. as the proprietor of the store, then, in that case, if you should so find that B. in consequence of any acts or representations or statements made by M., under the belief that J. was the owner of the stock, sold the stock to him and

[6] Approved in Hughes v. Keichline, 108 Pa. 115.
[1] Jamison v. Miller, 64 Iowa, 402.

gave him credit for it, then she would be estopped to deny that fact, because it would be through her act that the credit was obtained; and if you should so find, then your verdict should be for the defendant.[2]

Failure to claim right.

(1145) The court instructs the jury that if before P. had obtained his deed from G. and B. for the land in contest and before he had paid for the same P. went to R. and asked him if he had any claim on such land, and he told him that he did not claim any land on the south side of ———, and he was induced to take the deed and pay for said land by reason of said statement by R., then R. is barred of now setting up claim to said land against P.'s vendee, the plaintiff.[3]

(1146) The court instructs the jury that if about ten months after the said house was burned and the said lot was vacated and uninclosed, the plaintiff, by his acts and statements, indicated and made known to the defendant that he, plaintiff, made no claim of any kind to the said lot and had no claim or interest in the same, and you believe from the evidence that plaintiff made the disclaimer of interest in the property with the intention or expectation that defendant would act on it, and you believe from the evidence that defendant went upon and fenced the same in consequence of such disclaimer, then the said plaintiff is estopped from asserting any right or claim contrary to such acts and statements and cannot maintain the action.[4]

Knowledge by party to be estopped.

(1147) The court instructs the jury that to constitute an equitable estoppel of the rights of the plaintiffs in this action, it must be shown that the plaintiffs were apprized of

[2] Borkenhagen v. Paschen, 72 Wis. 272.

[3] Approved in Ratcliff v. Bellfonte Iron Works Co., 87 Ky. 559.

[4] Approved in Ford v. Fellows, 34 Mo. App. 630.

each sale to innocent vendees, before it was made, so that they might have had an opportunity to inform the purchaser of their interest in the property sold.[5]

CHAPTER LVIII.

EVIDENCE.

Presumption from rendering incorrect account, 1148, 1149.
Admissibility of evidence, 1150-1152.
Admissibility of expert testimony, 1153.
Admissibility of parol evidence, 1154.
Proof of handwriting, 1155, 1156.
Province of court and jury with reference to written evidence, 1157-1160.
Preponderance of evidence, 1161-1166.
Same—Instruction to be given in case of special verdict, 1167-1170.
Weight of admissions, 1171.
Effect of documentary evidence, 1172.
Jury exclusive judges of weight of testimony, 1173.
Instruction to disregard evidence, 1174, 1175.

Presumption from rendering incorrect account.

(1148) The jury are instructed, that, in considering and weighing the testimony of the plaintiff, C., they are entitled to consider, from the evidence, whether the bill, as rendered by him, and which is in evidence in this case, was just and true or not, and if any overcharges or errors are contained therein, whether the same were intentionally and knowingly made or adopted by him; and the jury are further entitled, in the same connection, to consider the book which is in evidence in this case, and whether the same was truly and correctly kept or not, and if not, how far the said C. is responsible for any errors that the jury may, from the evidence, find therein.[1]

[5] Approved in Cox v. Matthews, 17 Ind. 367.

[1] Approved in Lonergan v. Courtney, 75 Ill. 580. This was an action on the common counts.

(1149) The jury are instructed, that if they find, from the evidence, that errors occurred in the bill rendered to the defendant, or in the book, both of which are in evidence in this case, and that the witness, A. (or the plaintiff, C.) had any connection therewith, the jury are entitled to consider their connection, with any such errors, and the nature of such connection, in considering and weighing their testimony in this case (together with the other evidence in the case; and the jury are further instructed, that they are the judges of the credibility of the witnesses, and the weight of the testimony on both sides of the case.)[2]

Admissibility of evidence.

(1150) The court instructs the jury that counsel for the plaintiff have agreed that the accounts offered by the defendant in evidence and taken from his books, shall have the same effect as though the books themselves had been duly proved and produced in court; but unless the jury believe from the evidence that the books from which said accounts were taken were books of original entry, then same are not evidence in favor of the defendant on this trial.[3]

(1151) The court holds that no rule of law requires all the evidence, or the strongest evidence of the matters in dispute, but only that is excluded which, from the nature of the case, supposes evidence superior in quality or grade behind, in the power of the party whose duty it is to produce the same,—that is to say, the party whose duty it is to prove a fact must produce the best evidence which, from the nature of the case, must be supposed to exist, of such fact, and to be within the control of the party.[4]

[2] Approved in Lonergan v. Courtney, 75 Ill. 580.

[3] Approved in Shrewsbury v. Tufts, 41 W. Va. 212.

[4] Vigus v. O'Bannon, 118 Ill. 334. This instruction is proper where the case is tried by the court, but it is proper to refuse such an instruction in a case tried before a jury, although the instruction is correct as an abstract principle of law.

(1152) The court instructs the jury that the statements or declarations of persons who are dead may be used as tending to locate a corner of an old survey, but the persons who made the declaration must be such as had peculiar means of knowing the fact of which they speak, such as the surveyor or chain carrier who were engaged on the original survey, or the owner of the tract or of an adjoining tract calling for the same boundaries; or the declarations must be those of tenants, processioners, and others whose duty or interest would lead them to diligent inquiry and accurate information of the fact, in controversy.[5]

Admissibility of expert testimony.

(1153) The court instructs the jury that in determining the question as to whether the fence was sufficient to turn hogs, horses, sheep and cattle, the jury have a right to take the testimony of farmers who are acquainted with fences.[6]

Admissibility of parol evidence.

(1154) The court instructs the jury that, what the contract was between these parties is to be determined by the writing,—the note itself. This is not to be controlled or altered or varied by proof of any parol or verbal agreement or understanding between them at or before the time of signing the note.[7]

Proof of handwriting.

(1155) The court instructs the jury that, although a witness may swear that he has seen the defendant write, yet this is not proof of the execution of an instrument in writing, purporting to be executed by the defendant, unless the witness is able to distinguish the signature to said instrument as that of the defendant, according to the belief of the wit-

[5] Reusens v. Lawson, 91 Va. 226.

[6] Approved in Illinois Cent. R. Co. v. Swearingen, 47 Ill. 206.

[7] Approved in Cook v. Brown, 62 Mich. 473.

ness, founded on his previous knowledge of the handwriting of the defendant.[8]

(1156) The court instructs the jury that the proof of the signature of the defendant to the note in question, cannot be made by comparison with other signatures, but the burden of proof of his handwriting must be made by witnesses who have seen defendant write, and are familiar with his signature, or who have seen letters or documents which the defendant had, in the course of business, recognized or admitted to be his own handwriting.[9]

Province of court and jury with reference to written evidence.

(1157) The court instructs the jury that the evidence upon this question (whether ———) is mainly record evidence or written evidence, and under the law it is the duty of the court to construe such instruments, and to state the effect of such evidence, and it is the duty of the jury to receive and to accept the instructions so given; and this is so even though you may think the instructions here given are wrong.[10]

Preponderance of evidence.

(1158) The court instructs the jury that the preponderance of the evidence in a case is not alone determined by the number of witnesses testifying to any fact or facts, but, in determining where the preponderance is, the jury must take into consideration the facts and circumstances proved in the case and also must consider the opportunities or occasion of the witnesses seeing, knowing or remembering what they testify to or about, the probability or improbability of its truth, the relation or connection, if any, between the witnesses and the parties, their interest or lack of interest in the result of the case, and their conduct and demeanor while so testifying.[11]

[8] Approved in Putnam v. Wadley, 40 Ill. 346.
[9] Approved in Putnam v. Wadley, 40 Ill. 346.
[10] Approved in Merrill v. Reaver, 50 Iowa, 404.
[11] Approved in Meyer v. Mead, 83 Ill. 19.

(1159) The court instructs the jury that the burden is upon the plaintiff to make out her case by a preponderance of the evidence, and if she has not done so, you will find for the defendant.[12]

(1160) The court instructs the jury that the burden of proof is upon the plaintiff, and that it is incumbent on her to establish her case by a preponderance of evidence, and that, unless they believe that she has done so from all the evidence in the case, they will find for the defendant, and the court further instructs the jury that if they believe that the evidence in this case is equally balanced, then they will find for the defendant.[13]

(1161) The court instructs the jury that the issue in this case is whether or not the defendant delivered the ———. The plaintiffs having brought their suit, the law casts upon them the burden of making out their case by a fair preponderance of the evidence. There is no technical meaning to the term preponderance of the evidence, it simply means that the burden is cast upon them to support their claim by a greater weight of evidence than the evidence adduced against their claim by the defendant, that is, the evidence brought by the plaintiffs must in your judgment weigh at least a little more than the evidence produced by the defendant against that claim. If the evidence in your judgment, is just evenly balanced, the plaintiff would not be entitled to recover. Their evidence must weigh a little more at least than the evidence on the part of the defendant, then, with this rule in mind, this is the question for you to determine in this case and find your verdict accordingly,—was there a deliv-

[12] Approved in Missouri, K. & T. Ry. Co. of Texas v. White, 22 Tex. Civ. App. 424. It is error to require proof to the satisfaction of the jury as this imposes a higher degree of proof than the law requires. Rolfe v. Rich, 149 Ill. 436.

[13] Approved in Georgia Pac. R. Co. v. West, 66 Miss. 310.

ery by the defendant of these ——— according to the contract between himself and the plaintiffs?[14]

(1162) The court instructs the jury that "the plaintiff holds the affirmative of the issue, or, what is called the burden of proof rests upon him, the defendant having denied the charges alleged against it in the declaration. The plaintiff must satisfy you by what is called a preponderance of the proof, that the wrong complained of was committed by the servant of the defendant, in manner and form as charged in the declaration. By a preponderance of proof, the court does not mean the largest number of witnesses on a given point; four or five witnesses may testify to a fact, and a single witness may testify to the contrary, but under such circumstances and in such manner and with such an air and appearance of truth and candor as to make it the more satisfactory or convincing to you that the one witness, with the opportunity of knowing the facts testified to, has told the truth of the matter. When you are thus satisfied that the truth lies with a single witness or any other number, you are justified in returning a verdict in accordance therewith. This is what is meant by a preponderance of proof. It is that character or measure of evidence which carries conviction to your minds."[15]

(1163) By mentioning "the burden of proof" and "preponderance of evidence" the court intends no reference to the number of witnesses testifying concerning any fact, or upon any issue in the case, but simply by way of expressing the rule of law, which is that, unless the evidence as to such issue appears in your judgment to preponderate, in respect to its credibility, in favor of the party to this action on whom

[14] Approved in Noyes, French & Fickett v. Parker, 64 Vt. 379.

[15] Approved in North Chicago City R. Co. v. Gastka, 27 Ill. App. 518.

the burden of proof as to such issue rests, then you should find against such party on said issue.[16]

(1164) The court instructs the jury that while the preponderance of the evidence does not consist wholly in the greater number of witnesses testifying the one way or the other, yet the number of credible and disinterested witnesses testifying on the one side or the other of a disputed point is a proper element for the jury to consider in determining where lies the preponderance of the evidence.[17]

(1165) The court instructs the jury that they are to consider all the testimony and it is plaintiff's duty to establish his case by a preponderance of the evidence, and the jury will return a verdict for defendant if the evidence is clearly balanced, or if it preponderates for defendant, or if they are in doubt as to the preponderance. The burden of proof is not on defendant and if the preponderance does not show (an act alleged which is essential to recovery) the verdict of the jury should be for the defendant.[18]

(1166) The jury are instructed that the preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a particular fact or state of facts. In determining upon which side the preponderance of the evidence is, the jury should take into consideration the opportunities of the several witnesses for seeing or knowing the things about which they testified; their conduct and demeanor while testifying, their interest or lack of any interest, if any, in the result of the suit; the probability or improbability of the truth of their several statements, in view of all the other evidence, facts and circumstances proved on the trial, and from all these circumstances determine upon which side is the weight or preponderance of the evidence.

[16] Approved in O'Connell v. St. Louis Cable & Western R. Co., 106 Mo. 482.

[17] West Chicago St. R. Co. v. Lieserowitz, 197 Ill. 607.

[18] North Chicago St. Ry. Co. v. Fitzgibbons, 180 Ill. 466, 54 N. E. 483.

The court instructs you as a matter of law that where two witnesses testify directly opposite to each other on a material point, and are the only ones that testify directly to the same point, you are not bound to consider the evidence evenly balanced on such point; you may regard all the surrounding facts and circumstances proved on the trial and give credence to one witness over the other, if you think such facts and circumstances warrant it.

Same—Instruction to be given in case of special verdict.

(1167) The court instructs the jury that the burden rests upon the plaintiff of proving the material facts averred in the complaint. Whether the facts are material, however, need not cause you trouble as that is a question of law for the court. You find what facts have been proven and in determining what have been proven, it will be necessary for you to consider what facts have been attempted to be proved, and by whom, that is, by which party. If the plaintiff asserts a fact and offers evidence to prove it, and the defendant offers evidence to disprove it, you will then weigh all of the evidence on that point. If you find that the evidence of the plaintiff outweighs that of the defendant, you should find the facts proved, and it should become a part of your verdict. If the evidence of the defendant upon that point outweighs that of the plaintiff, you will leave that fact out of your verdict, and it may arise that you will find the evidence entirely placed upon a fact asserted by the plaintiff, that is, you will find that after you have gravely considered all of the evidence upon such fact upon both sides, you are unable to determine which side has the preponderance. In such case, you should omit the fact asserted from your verdict. These remarks apply to the facts asserted and upon which proof was offered by the plaintiff; the same will apply to facts asserted by the defendant. After plaintiff has made proof of facts to entitle her to recover, her recovery may be defeated by other facts proved which avoid the effect of the

facts so proven by the plaintiff. These facts are averred by the defendant and constitute a part of the defense. The burden of proving such facts is upon the defendant by a fair preponderance of the evidence.[19]

Same—Positive and negative testimony.

(1168) The court instructs the jury that when one witness testifies that a certain fact took place, or that certain words were spoken, and several other witnesses equally credible testify that they were present at the time and place where the fact took place or where the words were spoken, and had the same means of information, and further testify that such fact did not exist or that the words were not spoken, it is their province to weigh the testimony and give a verdict according to the weight of testimony as it may preponderate on either side.[20]

(1169) The court instructs the jury as a matter of law that the affirmative testimony of witnesses that the bell was rung and whistle sounded at a given time and place is of greater force and weight than the negative testimony of witnesses of no greater credibility, and who had no better opportunity of hearing, that the bell was not rung or the whistle sounded, or that they did not hear them.[21]

(1170) The court instructs the jury that where witnesses testify that certain facts took place, and other witnesses of equal credibility having equal means of knowledge, testified that such facts did not take place, the jury should hear all the testimony and give a verdict as the weight preponderates.[22]

Weight of admissions.

(1171) The court instructs the jury that the admissions

[19] Approved in Pittsburgh, C., C. & St. L. R. Co. v. Burton, 139 Ind. 357.

[20] Approved in Frizell v. Cole, 42 Ill. 362.

[21] Atchison, T. & S. F. R. Co. v. Feehan, 149 Ill. 202.

[22] West Chicago St. R. Co. v. Mueller, 165 Ill. 499, 46 N. E. 373.

of the deceased shortly before his death will be considered by the jury with great care, and all the circumstances in connection therewith, his suffering, whether he was in such condition as to speak with mature consideration and due deliberation, and whether he spoke in regard to his legal rights, or whether he referred to and meant that defendant was not to blame for any willful intention to injure him or cause said accident, and then give his admission such meaning as you believe from all the circumstances he intended it to have, and give such weight to his statement or admission as in your judgment it may be entitled to. And the admission of deceased will not be conclusive as to what he states. But you will consider all the testimony in relation thereto as in your judgment the whole evidence will justify.[23]

Effect of documentary evidence.

(1172) The court instructs the jury, as a matter of law, that the certificate of the secretary of state of ———, under the great seal of state, is conclusive evidence, as against any and all papers in the case, that the title to the lands described in the ——— was, on the ——— day of ——— last, in the state of ———, and not in any other person or persons.[24]

Jury exclusive judges of weight of testimony.

(1173) The court instructs the jury that you are the exclusive judges of the weight of the evidence before you, and of the credit to be given to the witnesses who have testified in the case. If there is any conflict in the testimony you must reconcile it if you can. If not, you may believe or disbelieve any witness or witnesses as you may or may not think them entitled to credit. In civil cases juries are authorized to decide according as they may think the evidence preponderates in favor of one side or another.[25]

[23] Approved in Cooper v. Central Railroad of Iowa, 44 Iowa, 134.
[24] Approved in Ryan v. Brant, 42 Ill. 78.
[25] Approved in Liverpool & L. & G. Ins. Co. v. Ende, 65 Tex. 118.

Instruction to disregard evidence.

(1174) The court instructs the jury that there is no legally sufficient evidence in the case to show that defendants in the formation or incorporation of the ——— Company and the issue of certificates of stock thereof to the defendants M., H., and T. upon a valuation of their interest in the assets of ———, as mentioned in the evidence, conspired together to deceive or defraud the plaintiff as charged in the declaration in this case, and the jury are therefore not entitled to consider this action or proceeding on the part of defendants as any evidence whatever tending to prove or sustain said charges.[26]

(1175) The court instructs the jury as a matter of law that his Honor, Judge ———, in overruling the ——— filed by the plaintiff and others to the ———, in the ——— court of ———, and offered in evidence, determined that the ——— Company was a corporation duly and legally incorporated under the laws of the state of ———, and that the certificates of stock therein held by the defendants were issued to them bona fide and for a valuable consideration and the jury therefore are not entitled to consider the formation of said corporation or the issue of said stock to the defendants as aforesaid, as any evidence whatever tending to prove the charges made by the plaintiff in the declaration filed in this case.[27]

[26] Approved in Robertson v. Parks, 76 Md. 118.
[27] Approved in Robertson v. Parks, 76 Md. 118.

CHAPTER LIX.

EXECUTION OF WRITTEN INSTRUMENTS.

Corporate note, 1176.
Validity of instrument signed by another at grantor's request, 1177, 1178.
Authority to sign promissory note, 1179.
Proof of handwriting, 1180, 1181.
Knowledge of contents by signer, 1182.

Corporate note.

(1176) The court instructs the jury that if you find that ———, the treasurer, had express authority to sign the notes and checks and effect the loan in question, or if you find that these acts were within the apparent scope of his authority, or within the scope of the authority which he was accustomed to exercise without objection by these defendants, your verdict should be for the plaintiff; but if you find that borrowing this money in the way testified to and giving this paper was not within the authority expressly given to him, or within the apparent scope of the authority which he was accustomed to exercise, then your verdict should be for the defendants, and if you find that this money borrowed, or received for the paper in suit, was not for the use of the defendants, and the plaintiff knew or had good cause to know the fact, or if for any other reason the plaintiff did not in good faith trust the credit of the defendants, then your verdict should be for the defendants.[1]

Validity of instrument signed by another at grantor's request.

(1177) The court instructs the jury that under the laws of ——— it is not necessary in order for husband and wife to make a valid mortgage, that they or either of them should actually sign their names with their own hands, but if they appear before a proper officer and acknowledge the

[1] Approved in Rowland v. Apothecaries' Hall Co., 47 Conn. 384.

execution as the law provides and the officer attaches his certificate as the law provides, then this is sufficient, so far as the signing of the names to a mortgage is concerned.[2]

(1178) The court instructs the jury that if they find from the evidence that the certificate is true, then they will find for the plaintiff, and it can make no difference whether J. M. and R. M. actually did or did not sign their names to the mortgage with their own hands.[3]

Authority to sign promissory note.

(1179) The court instructs the jury that even if they should believe from the evidence in this case that defendant A and defendant B had money in bank standing to the credit of one of them, and that each had authority from the other to check in the other's name on such money, it does not follow from this fact alone that B gave to A authority to sign B's name to promissory notes, and the court instructs the jury that should they believe from the evidence that B had signed several notes for A as security, B signing his own name to such notes, this fact alone does not show authority in A to sign B's name to other notes.[4]

Proof of handwriting.

(1180) The court instructs the jury that, although a witness may swear that he has seen the defendant write, yet this is not proof of the execution of an instrument of writing, purporting to be executed by the defendant, unless the witness is able to distinguish the signature to said instrument as that of the defendant, according to the belief of the witness, founded on his previous knowledge of the handwriting of the defendant.[5]

[2] McClendon v. Equitable Mortg. Co., 122 Ala. 384.

[3] Approved in McClendon v. Equitable Mortg. Co., 122 Ala. 384.

It is to be borne in mind that the three foregoing instructions are applicable to the laws of Alabama.

[4] Hefner v. Palmer, 67 Ill. 161.

[5] Putnam v. Wadley, 40 Ill. 346.

(1181) The court instructs the jury that the proof of the signature of the defendant to the note in question, cannot be made by comparison with other signatures, but the burden of proof of his handwriting must be made by witnesses who have seen defendant write, and are familiar with his signature, or who have seen letters or documents which the defendant had, in the course of business, recognized or admitted to be his own handwriting.[6]

Knowledge of contents by signer.

(1182) The court instructs the jury that it is no defense to this note that the defendant when he signed the same did not understand the legal effect of signing it as he did or that he supposed his liability would be that of an indorser merely. His mistake of law, if there was such a mistake, would be no defense.[7]

CHAPTER LX.

EXEMPTIONS.

Waiver of exemption, 1183-1185.
Farm animals, 1186.

Waiver of exemption.

(1183) The court instructs the jury that a man may waive an exemption privilege by words, he may do it by acts, he may do it by words and acts both, or he may so conduct himself at the time that by his acts he may give the attaching officer to understand that he does not claim any privilege of exemption, but rather assents that the property may be attached.[1]

(1184) The court instructs the jury that if you believe from the evidence that plaintiff said to the attaching officer,

[6] Approved in Putnam v. Wadley, 40 Ill. 346.
[7] Cook v. Brown, 62 Mich. 473.
[1] Fogg v. Littlefield, 68 Me. 52.

"There all that property in that yard, comprising these oxen and those cows are mine, and you can take the oxen or any of the rest of them you see fit," there will be a consent amounting to a waiver, but if you believe from the evidence that what plaintiff said to the officer was, "You perform your duty according to law and I will attend to my business," you are warranted in the conclusion that there was not a waiver of plaintiff's exemption rights.[2]

(1185) The court instructs the jury that the exemption of a pair of cattle is a personal privilege to the owner and the owner has a right to waive it if he sees fit. He may voluntarily waive his privilege of exemption and give an express consent that the officer may attach the exempt property and sell it for his debt, and evidence sufficient to establish that fact is introduced where the jury is satisfied that that was the intention of the parties at the time.[3]

Farm animals.

(1186) The court instructs the jury that you may without positive evidence infer that the horse levied upon was a plow horse, and if you believe from the evidence before you that he was adapted to this business that is sufficient without showing that he was so used.[4]

CHAPTER LXI.

FACTORS.[1]

Creation of agency, 1187.
Good faith to principal, 1188.
Same—Adverse interest, 1189.
Keeping principal informed, 1190.

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[2] Fogg v. Littlefield, 68 Me. 52.

[3] Fogg v. Littlefield, 68 Me. 52.

[4] Approved in Matthews v. Redwine, 25 Miss. 99.

[1] See, also, "Agency," "Brokers," for forms on more general or analogous principles of law.

Notice of authority to purchaser, 1191.
Duty in selling—Errors of judgment, 1192.
Same—As to time of sale, 1193.
Same—Cash or credit sales, 1194, 1195.
Same—Usage of trade, 1196.
Reshipment and forwarding, 1197.
Warranties, 1198, 1199.
Fidelity to instructions, 1200.
Same—Instructions vague or uncertain, 1201, 1202.
Same—Time, terms, or manner of sale, 1203-1205.
Same—Excuse for not following, 1206, 1207.
Power to pledge, 1208, 1209.
Receiving payment, 1210.
Liability of factor to shipper for price, 1211.
Reimbursement of factor, 1212.
Same—Sale to repay advances, etc., 1213, 1214.
Sale in violation of instructions to repay advances, etc.—Instruction given before or at time of consignment, 1215.
Same—Those given after consignment or advances made, 1216.
Lien, 1217-1220.
Same—On proceeds, 1221.
Same—What secured, 1222.
Set-off, 1223, 1224.
Damages, 1225.

Creation of agency.

(1187) The court charges that in order to constitute defendant a factor or commission merchant for the plaintiff, it is necessary for you to find that there was both an appointment as commission merchant by the plaintiff and an acceptance of such appointment by defendant; but the jury may find that such appointment and acceptance were made if they find facts from which an appointment and its acceptance may be inferred, and if you find that (here state facts from which the inference arises, as, defendant's sole business was to sell goods as a commission merchant and that plaintiff shipped to him goods of the kind which defendant was accustomed to sell and that the goods so sent were sold by defendant), then the jury may find that defendant assumed the relation of a factor to plaintiff.[2]

[2] Dows v. McCleary, 14 Ill. App. 137. Delegation of authority, see post, 1197, "Reshipment."

Good faith to principal.

(1188) You are instructed that it is the duty of a commission merchant who undertakes to sell goods consigned to him to exercise toward his principal who consigns such goods, good faith in all his dealings.[3]

Same—Adverse interest.

(1189) If you find from the evidence that defendant so conducted the sale in question as to make a profit to himself out of the bargain, or if he sold so as to obtain a personal interest in the property, it is a departure from the duty of the defendant towards plaintiff for which defendant will be held liable.[4]

Keeping principal informed.

(1190) The court instructs the jury that a commission merchant who undertakes to sell goods consigned to him is under the duty of keeping the consignor advised of all facts and circumstances materially affecting the goods consigned or their sale, which facts may make it necessary for him to give instructions to the commission merchant or to take measures to safeguard such consignor's interests, and if the jury find as a fact that circumstances did arise which affected the plaintiff's interests, and that defendant did not inform plaintiff when he reasonably might have done so, defendant will be liable for any loss which has resulted from failure to give such information.[5]

[3] Evans v. Potter, 2 Gall. (U. S.) 13; Babcock v. Orbison, 25 Ind. 75.

[4] Hammond v. Olmstead, 10 Fed. 223; Thayer v. Hoffman, 53 Kan. 723; Keighler v. Savage Mfg. Co., 12 Md. 383.

[5] Forrestier v. Boardman, 1 Story (U. S.) 43, where a purchaser on credit subsequently became insolvent; Harvey v. Turner, 4 Rawle (Pa.) 223, where the factor omitted to notify the principal that a note given for the price of the goods was not met at maturity; Spruill v. Davenport, 116 N. C. 34, where the factor was unable to sell as instructed; Given v. Lemoine, 35 Mo. 119, where a factor authorized to sell at discretion was held obliged to furnish information of the state of the market.

Notice of authority to purchaser.

(1191) You are instructed that if you find that plaintiff at the time he bought the goods of defendant had no other reason to suppose that defendant was acting for another than the mere knowledge that defendant's business was that of a commission merchant then you will find for the plaintiff.[6]

Duty in selling—Errors of judgment.

(1192) The court instructs the jury that although they may find from the evidence that defendant sold the plaintiff's goods at a time when the market price was advancing, and although the jury find that by waiting a larger price might have been obtained, yet defendant is not liable if the jury find as a fact that in selling when he did, defendant was acting in good faith and without negligence was exercising the best of his judgment.[7]

Same—As to time of sale.

(1193) The court instructs the jury that in the absence of any instructions from plaintiff to defendant as to the time of sale, defendant should sell the goods within a reasonable time, exercising a sound discretion, and defendant is not liable unless the jury find as a fact that the sale in question was (unreasonably delayed).[8]

[6] Bliss v. Bliss, 7 Bosw. (N. Y.) 399; Hogan v. Shorb, 24 Wend. (N. Y.) 458.

[7] Jarvis v. Hoyt, 2 Hun, 637. See, also, Ward v. Bledsow, 32 Tex. 251, where the sale was at the bottom of a fluctuating market, and Lockett v. Baxter, 3 Wash. Terr. 350, where there was a failure to sell upon a falling market.

[8] Feild v. Farrington, 10 Wall. (U. S.) 141.

If the loss was from prematurely selling when a better price could have been obtained by holding instead of the parenthetical words say (prematurely made by defendant, and that in making it he failed to exercise discretion or judgment in not foreseeing that a higher price could have been obtained by holding).

Same—Cash or credit sales.

(1194) The court instructs the jury that defendant in selling the goods of plaintiff upon credit was bound to use reasonable care and diligence to ascertain the financial responsibility of the purchasers, and if the jury finds as a fact that defendant did make reasonable inquiries and use reasonable diligence to ascertain whether the parties were responsible persons, and did not give credit to any purchasers who were of doubtful responsibility, or who were apparently insolvent, the loss, if you find there was any loss resulting from sales to irresponsible or insolvent persons, will fall upon the plaintiff.[9]

(1195) It is the law that unless instructed to the contrary by the shipper or unless there is a usage or custom of the trade requiring cash sales, a commission merchant is authorized to sell goods upon a reasonable credit, and unless you find from the facts that such a usage did not exist or that an understanding existed or instructions were given to sell only for cash, then defendant is not liable for a sale on a reasonable credit.[10]

Same—Usage of trade.

(1196) The court instructs the jury that if they find from the facts that at the time of receiving and selling the goods in question there was at the place where defendant did bus-

[9] Burrill v. Phillips, 1 Gall. (U. S.) 360; Durant v. Fish, 40 Iowa, 559; Foster v. Waller, 75 Ill. 464, where it was held that a "high" degree of diligence was necessary where credit sales were made on the board of trade.

[10] Joslin v. Cowee, 52 N. Y. 90. In this case the factor was induced to sell to an insolvent purchaser by fraud, which he did not discover in time to protect the consignor, and it became impossible to follow the goods.

In a few states it is held that no authority to sell on credit exists unless the usage of the place permits. See Babcock v. Orbison, 25 Ind. 75; Durant v. Fish, 40 Iowa, 559; Furth v. Miller, 67 Mo. App. 241; James v. McCredie, 1 Bay (S. C.) 294; Harbert v. Neill, 49 Tex. 143.

iness an established usage or custom in the trade to (here state what the usage was), then a sale by defendant according to such usage is a proper performance of his duty, for the consequences of which sale he is not liable.[11]

Reshipment and forwarding.

(1197) The court instructs the jury that if you find that defendant did not sell the goods but reshipped them to another market to be there sold, he will be liable to plaintiff for any loss thereby resulting, unless defendant was expressly authorized by plaintiff to make such reshipment.[12]

Warranties.

(1198) The court instructs the jury that (A. B., the factor) in selling these goods for (defendant, the owner) had authority to warrant the condition and quality of the goods at the time of sale and could thereby bind (defendant, the owner),[13] unless you find that according to usage of the (state what trade, as the cotton trade) a warranty does not ordinarily accompany a sale.[14]

(1199) The court instructs the jury that although a commission merchant has an implied authority to warrant the present condition and quality of the goods sold by him, yet he cannot bind the owner by warranties respecting future events, and if you find that as a part of the sale the factor warranted that (state what the warranty was, e. g. the flour would not spoil during the voyage) then defendant (the seller of the goods) is not bound to the plaintiff (purchaser).[15]

[11] Phillips v. Moore, 69 Ill. 155; Hopgood v. Batcheller, 4 Metc. (Mass.) 577; Cotton v. Hiller, 52 Miss. 7; Burke v. Frye, 44 Neb. 223; McConnico v. Curzen, 2 Call (Va.) 358, 1 Am. Dec. 540.

[12] Phy v. Clark, 35 Ill. 377; Wootters v. Kauffman, 73 Tex. 395; Pugh v. Porter Bros. Co., 118 Cal. 628; Burke v. Frye, 44 Neb. 223.

[13] Schuchardt v. Allens, 1 Wall. (U. S.) 359.

[14] Pickert v. Marston, 68 Wis. 465, 60 Am. Rep. 877.

[15] Upton v. Suffolk County Mills, 11 Cush. (Mass.) 586, 59 Am. Dec. 163.

Fidelity to instructions.

(1200) The court instructs the jury that if they find from the evidence that plaintiff instructed defendant to (here state what were the instructions given) it was the duty of defendant to faithfully follow out such instructions, and if the jury find that defendant did not follow them, but (here state the particular in which it is alleged that the instructions were departed from) then defendant will be liable for all losses caused by such departure.[16]

Same—Instructions vague or uncertain.

(1201) The court instructs the jury that an instruction given by one who consigns goods to a commission merchant for sale must in order to bind the commission merchant be express and positive, and if the jury find from the evidence that statements were made by plaintiff to defendant respecting the manner or mode of sale or its terms, and that such statements were not directions but were mere expectations or wishes, then defendant will not be liable for departing from them.[17]

(1202) The court instructs the jury that the directions given by one who consigns goods to a commission merchant to be sold must in order to bind the commission merchant be unambiguous and certain in meaning, and if you find from the evidence that directions as to the manner, mode and terms of sale were given, but that such directions were not couched in clear and understandable language, the loss which is entailed through inability of the defendant to follow such instructions must fall upon the plaintiff who gave them.[18]

[16] Dunbar v. Miller, 1 Brock. (U. S.) 85; Jones v. Marks, 40 Ill. 313; Leverick v. Meads, 1 Cow. (N. Y.) 645.

[17] Jarvis v. Hoyt, 2 Hun (N. Y.) 637; Harper v. Kearm, 11 Serg. & R. (Pa.) 280.

[18] Courcier v. Ritter, 4 Wash. (U. S.) 549; Mann v. Lains, 117 Mass. 293; Jarvis v. Hoyt, 2 Hun (N. Y.) 637.

This instruction should be followed if necessary by instructions telling the jury whether particular directions are, as a matter of

Same—Time, terms, or manner of sale.

(1203) The court instructs the jury that if they find from the evidence that directions were given by plaintiff to defendant, fixing the time at which sale should be made, then for failure to sell at that time defendant will be liable for any loss which has resulted.[19]

(1204) The court instructs the jury that a commission merchant who is directed to sell for cash must actually receive the payment at the time the goods are delivered, and if the jury find that a sale was made by defendant to be paid for in ——— days, the defendant will be liable for any loss thereby resulting unless the jury also find from the evidence that it was the common usage of defendant's trade in his vicinity to make delivery in cash sales without immediately receiving payment.[20]

(1205) You are instructed that if you find that defendant sold in violation of plaintiff's instructions and if you find that by refraining from so selling defendant would have been enabled to sell at a higher price plaintiff may recover an amount equal to the difference between the price obtained and the highest market price which the goods would have commanded at any time between the time of sale and a reasonable time thereafter within which plaintiff might have brought action.[21]

law, ambiguous; for instance it was held that an instruction to sell on arrival was not ambiguous. Evans v. Route, 7 N. Y. 186.

[19] Courcier v. Ritter, 4 Wash. (U. S.) 549; Pulsifier v. Shepard, 36 Ill. 513; Johnson v. Wade, 2 Baxt. (Tenn.) 480.

If necessary an instruction should be added requiring the jury to find that the departure from the instructions was the proximate cause of the loss. See Lehman v. Pritchard, 84 Ala. 512.

[20] Bliss v. Arnold, 8 Vt. 252; Clark v. Van Northwick, 1 Pick. (Mass.) 343.

It has also been held that receiving a check in payment is a violation of an instruction to sell for cash. Hall v. Stores, 7 Wis. 253.

[21] Whelan v. Lynch, 60 N. Y. 469, 19 Am. Rep. 202; Baker v. Drake, 53 N. Y. 211, 13 Am. Rep. 507, 66 N. Y. 518.

Same—Excuse for not following.

(1206) The court instructs the jury that although it be proven that defendant did not follow the instructions given him by plaintiff as to the mode, manner and terms of sale, yet if the jury find from the evidence that the instructions were not followed by reason of defendant's inability to do so, using all reasonable diligence, then defendant is not liable for his failure to sell as directed;[22] but defendant's inability to comply with the instructions, if you find such to be the fact, will not excuse him from the consequences of a departure from the directions given by plaintiff.[23]

(1207) The court instructs the jury that a failure to sell in the manner directed by plaintiff would be excused by a sudden emergency or necessity, or other unexpected event, requiring a deviation from the directions given, and if the jury find as a fact that plaintiff instructed defendant to (here state what directions were given, as to the mode of sale or as to other matters), and if they find that (here state what emergency or other cause required the deviation) then defendant is not liable to plaintiff for failing to follow the directions given.[24]

Power to pledge.

(1208) The court instructs the jury that a commission merchant has no general authority to pledge property consigned to him, but the authority to pledge may be implied when it is necessary to effect the selling of the goods, and if you find from the facts that the pledge in question was made to (state for what purpose, as, raise money wherewith

[22] Evans v. Route, 7 N. Y. 186, where it was impossible to sell the goods upon arrival as directed.

[23] Pomeroy v. Sigerson, 22 Mo. 477.

[24] Frothingham v. Everton, 12 N. H. 239, where the goods were perishable; Dusar v. Perit, 4 Bin. (Pa.) 361, where by accident a vessel was obliged to unload before she reached the port at which sale was to be made.

to discharge customs duties for which the goods in question were at the time held) then for so pledging defendant sustains no liability to plaintiff.[25]

(1209) (In place of the enclosed words may be substituted "raise money wherewith to meet drafts drawn by the plaintiff").[26]

Receiving payment.

(1210) The court instructs the jury that as an incident to the ordinary power of the factor to sell goods, he may receive payment from the purchaser, and it makes no difference whether the sale was for cash or upon credit.[27]

Liability of factor to shipper for price.

(1211) The court instructs the jury that if they believe, from the evidence, that defendant, R., as the commission merchant of plaintiffs, received, on account of the grain in question shipped to him, as mentioned in the foregoing instruction, the money arising from the proceeds of the sale of such grain, or a check as money, of his own volition, which he had not paid over to plaintiffs, on demand made before commencement of this suit, then the jury should find for the plaintiffs.[28]

Reimbursement of factor.

(1212) The court instructs the jury that if they find from the evidence that defendant expended his own money for the purpose of (here state what was the object of the expenditure by the factor) and if the jury find that such expenditure was necessary to protect the plaintiff's interests or to properly effect a sale of the goods, then plaintiff must answer to defendant for the amount of money which you find to have been so expended.[29]

[25] Evans v. Potter, 2 Gall. 13.
[26] Citizens' State Bank v. Abbott, 80 Iowa, 646.
[27] Adams v. Fraser, 82 Fed. 211.
[28] Approved in Reichwald v. Gaylord, 73 Ill. 503.
[29] Brander v. Lund, 11 La. Ann. 217 (purchase of cotton); Brown

Same—Sale to repay advances, etc.

(1213) The court instructs the jury that if the jury find from the evidence that goods were consigned by the defendants, J. R. & Co., to the garnishees, W., B. & Co., on which the said W., B. & Co. had made advancements prior to the issuing and service of the attachment in this case and that also prior thereto the said W., B. & Co., had accepted an order drawn by the said J. R. & Co., in favor of a certain D. W. S., and shall further find that the said goods were sold by the said W., B. & Co., and there remained no balance on the sales thereof in their hands after reimbursing themselves for their advancements and deducting proper charges and commissions for the said sales, and the discharge of the order before mentioned, then, that the plaintiff is not entitled to recover, provided the said garnishees used reasonable skill and ordinary diligence in effecting the sales of said goods and sold the same at the dates shown by the accounts offered in evidence by the garnishees and for the best rates then obtainable for said goods in the market.[30]

(1214) The court instructs the jury that if the jury find from the evidence that the goods were consigned by the defendants J. R. & Co., to the garnishees, W., B. & Co., on which the said W., B. & Co. had made advancements prior to the issuing and service of the attachment in this case, and also prior thereto, the said W., B. & Co., had accepted an order drawn by the said J. R. & Co., in favor of a certain D. W. S., offered in evidence by the garnishees and shall further find that the said goods were sold by the said W., B. & Co., and that neither at the time of serving such attachment nor since did there remain any balance in their hands upon said sales after the reimbursement of themselves for their advancements, and deducting the proper charges and

v. Clayton, 12 Ga. 564 (expenses of sale and of fitting damaged goods for market).

[30] Approved in Whitney v. Wyman, 24 Md. 131.

commissions and the discharge of the order before mentioned, then the plaintiff is not entitled to recover.[31]

Sale in violation of instructions to repay advances, etc.—Instruction given before or at time of consignment.

(1215) The court instructs the jury that the fact that defendant had made advances of money to the plaintiff upon the security of the goods in question gave defendant no authority to sell such goods in violation of directions given by plaintiff as to the manner, mode or terms of sale, provided you find from the facts that such directions were given at the time when the consignment was made to defendant or were given before the time when the advancements were made.[32]

Same—Those given after consignment or advances made.

(1216) The court instructs the jury that if they find from the evidence that plaintiff did instruct defendant as to the manner, mode and terms of sale, but that such instructions were not given to the defendant at the time when the goods were consigned to him, and were not given until after defendant had advanced money to the plaintiff or for the plaintiff's benefit, on the security of the goods consigned, then defendant had the right to sell such goods for the purpose of reimbursing himself for the amount advanced, even though in so selling he followed the instructions given him by the plaintiff.[33]

Lien.

(1217) The court instructs the jury that a person who as a commission merchant receives goods from another to be

[31] Approved in Whitney v. Wyman, 24 Md. 131.

[32] Loraine v. Cartwright, 3 Wash. (U. S.) 357; Bell v. Paulner, 6 Cow. 128.

[33] Howard v. Smith, 56 Mo. 314, where the consignor subsequently fixed a minimum price; Weed v. Adams, 37 Conn. 381, where there was a rising market and an immediate sale would not have satisfied the advances and charges of the factor.

sold has a right to retain the possession of such goods as a security for all commissions, advances and expenditures incident to the sale of such goods, and if the jury find as a fact that commissions were earned by the defendant, or that the advances or expenditures were made by him for the plaintiff's benefit, then defendant is not liable for refusing to surrender possession of the goods upon the plaintiff's demand until plaintiff should pay or satisfy such commissions and charges.[34]

(1218) The court charges you that in order that (defendant, the factor), may establish his right as a commission merchant to hold the goods (or money) in question as security for (repayment of moneys advanced to plaintiff) it is necessary for you to find from the evidence that defendant was and is in possession of (those goods).[35]

(1219) (If the validity of the factor's possession is in issue add to the foregoing this): And you must also find that defendant came into possession after (here state any condition, as, paying a draft drawn against the goods if you find as a fact that it was intended that defendant should pay the draft before acquiring any right to the goods).[36]

(1220) (If constructive possession is involved in issues, add this): It is not necessary, however, for the jury to find that (defendant) was personally in possession or that he was physically in possession. It is sufficient if from the evidence you find that (here state what constructive possession was relied on, as, defendant's agent held possession of the goods).[37]

[34] Sewell v. Nichols, 34 Me. 582; Brown v. Clayton, 12 Ga. 564; Winne v. Hammond, 37 Ill. 99.

[35] Warren v. Columbus First Nat. Bank, 149 Ill. 9, where goods were sent direct to customers by the consignor; Hodges v. Kimball, 49 Iowa, 577, where goods were seized by third persons before they had left the consignor's possession.

[36] Winter v. Coit, 7 N. Y. 288, 57 Am. Dec. 522; Rochester Bank v. Jones, 4 N. Y. 497, 55 Am. Dec. 290.

[37] Burrus v. Kyle, 56 Ga. 24.

Same—On proceeds.

(1221) The court instructs the jury that it is the right of a commission merchant who has sold goods consigned to him to retain the proceeds of such goods or the evidences of indebtedness given for the purchase price of the goods until the person consigning such goods shall reimburse the commission merchant for all advances or expenditures properly made and for such commissions as shall have been earned.[38]

Same—What secured.

(1222) The court instructs the jury that a commission merchant may retain possession of the goods or proceeds thereof not only to secure commissions, advances and expenditures relating to the sale of the goods in question, but also to secure a general balance due to the commission merchant on account running between him and the consignor.[39]

Set-off.

(1223) The court instructs you that if you find that plaintiff sold the goods in question as a commission merchant and that the goods were the property of (A. B., the owner) and that at that time, or subsequently but before (the ——— day of ———, ——, state the day when action was brought) A. B. was indebted to defendant in a sum then due equal to or greater than the purchase price of the goods plaintiff cannot recover.[40]

(1224) If the factor claims a lien, conclude thus: Plaintiff can recover only so much as equals the amount which you find was advanced by him to A. B. together with necessary expenditures on A. B.'s behalf and the amount of commissions earned by plaintiff.

[38] Bradley v. Richardson, 2 Blatchf. 343; Vail v. Durant, 7 Allen (Mass.) 408; Chappel v. Cady, 10 Wis. 111.

[39] Chapman v. Kent, 3 Duer (N. Y.) 334; Brice v. Brooks, 26 Wend. (N. Y.) 374, where it was held that there need not have been a general agency.

[40] McCobb v. Lindsay, 2 Cranch, C. C. 215.

Damages.

(1225) You are instructed that if you find that defendant without authority (reshipped the goods to another market plaintiff may recover an amount equal to the difference between the market price where sale was to be made and the price actually obtained).[41]

CHAPTER LXII.

FALSE IMPRISONMENT.

Liability of officer, 1226, 1227.
Liability of individual for acts of officer, 1228.
Joint liability for illegal arrest, 1229, 1230.
Liability of police commissioners for ordering arrest of one for wearing badge contrary to rules, 1231, 1232.
Inference of improper motives, 1233.

Liability of officer.

(1226) The court instructs the jury that if defendant, being then the sheriff of ——— county, without having in his hand any warrant for the arrest of plaintiff, arrested him and put him in the custody of his jailor, with instructions to take him to jail, and if afterwards, and after said jailor had released the prisoner, under a suggestion that there was no capias, nor offense committed in the sheriff's presence, defendant, in an insulting and unlawful manner, again, without any capias, arrested plaintiff and maltreated him, then find for plaintiff, and assess such a sum, by way of and for damages, as you deem adequate and proper, considering the nature of the facts proved.[1]

(1227) The court instructs the jury that drunkenness of the officer is no excuse, but may be received by the jury as an aggravation; but the jury will consider the whole facts, and

[41] Comer v. Way, 107 Ala. 300.
[1] Approved in Hall v. O'Malley, 49 Tex. 70.

from them find such damages as you deem adequate and proper.[2]

Liability of individual for acts of officer.

(1228) The court instructs the jury that if they believe from the evidence that defendant merely stated facts to the policeman, without wishing an arrest to be made, he is not liable for the action of the policeman in making the arrest complained of in this suit or for the imprisonment of the plaintiff, and the jury should find for the defendant.[3]

Joint liability for illegal arrest.

(1229) The court instructs the jury that if the jury believe, from the evidence, that the plaintiff has not committed any offense alleged in the defendants' pleas, and that both of the defendants concurred in laying hands on him and arresting him, then the jury are instructed that they should find both the defendants guilty, and assess the plaintiff's damages.[4]

(1230) The court instructs the jury that if they believe from the evidence and under the instructions herewith given, that the defendants, H. and M., were both engaged in the common purpose of unlawfully arresting the plaintiff, and that H. had laid hold of the plaintiff, and that M. immediately afterwards, in pursuance of said common purpose of unlawfully arresting said plaintiff, struck said plaintiff with a club, and that said striking was done in the presence of H., and that H. did not try to prevent the same, but, on the contrary thereof, adopted and approved said act of M. in striking said plaintiff, then the jury are instructed that said H. is as responsible in this action for said striking as is M.[5]

[2] Hall v. O'Malley, 49 Tex. 70.
[3] Reno v. Wilson, 49 Ill. 95.
[4] Approved in Mullin v. Spangenberg, 112 Ill. 140.
[5] Approved in Mullin v. Spangenberg, 112 Ill. 140.

Liability of police commissioners for ordering arrest of one for wearing badge contrary to rules.

(1231) The court instructs the jury that the defendants acting as a board of police commissioners, or a majority thereof, had no right to order the arrest of the plaintiff for publicly wearing the uniform and badge prescribed by said board for the police force.[6]

(1232) The court further instructs the jury that if they shall believe from the evidence that the defendants, whether acting as the board of police commissioners or as individuals did issue an order for the arrest of the plaintiff for so wearing such uniform, and that because of such order, so issued, the said plaintiff was arrested and imprisoned, then they must find for the plaintiff.[7]

Inference of improper motives.

(1233) The court further instructs the jury that an improper motive may be inferred from a wrongful act based upon no reasonable ground; and that such improper motive constitutes malice in law. And to constitute such malice it is not necessary that such wrongful act should be prompted by anger, malevolence, or vindictiveness; but such inference of malice may be removed by the evidence in the case.[8]

CHAPTER LXIII.

FENCES.

Right to remove boundary fences, 1234.
Adjudication by fence viewers of expenses of rebuilding fence, 1235-1237.
Criminal prosecution for injuries to fence, 1238, 1239.

Right to remove boundary fences.

(1234) The court instructs the jury that the main ques-

[6] Bolton v. Vellines, 94 Va. 393.
[7] Bolton v. Vellines, 94 Va. 393.
[8] Bolton v. Vellines, 94 Va. 393.

tion is where the line between the parties ran and upon whose side of it was the alleged trespass committed. If the fence was on the defendant's side of the line, he had a right to move it and do what he pleased with it; but if upon the plaintiff's side he had not the right to interfere with it. If, however, the jury should find from the evidence in the case that the fence was made and kept up jointly by the defendant and the plaintiff, or those under whom they claimed, immediately upon the line between them, then the defendant has the right to remove his portion of it, upon giving to the plaintiffs reasonable notice of his intention to do so.[1]

Adjudication by fence viewers of expenses of rebuilding fence.

(1235) The court instructs the jury that it was not necessary that the adjudication of the fence viewers, as to the sufficiency of the fence as rebuilt, should have been reduced to writing.[2]

(1236) The court instructs the jury that it was not necessary to entitle the plaintiff to recover that the certificate of the fence viewers, of the value of the fence, or a copy thereof, should have been served upon the defendant, or presented to him, before, or at the time of, demand of the sum certified.[3]

(1237) The court instructs the jury that it was not necessary that the notice of the fence viewers to plaintiff and defendant, of the time they would examine the fence, should have been given for any definite time or number of days before such examination. The law required due notice to be given. By the term due notice, is meant reasonable notice; and the notice to the defendant was due and reasonable, if after the notice was given he had a reasonable time to go from the place where it was served and be at the examination of the fence at the time specified in the notice.[4]

[1] Approved in Clowers v. Sawyers, 38 Tenn. 156.
[2] Approved in Tubbs v. Ogden, 46 Iowa, 134.
[3] Approved in Tubbs v. Ogden, 46 Iowa, 134.

Criminal prosecution for injuries to fence.

(1238) The court instructs the jury that if W. told the defendant, J., to move his fence back off his (W.'s) land, and in so moving the fence it became necessary to withdraw his fence from the fence of said W., such a tearing loose and withdrawing would not be unlawful, and for so doing defendant would be guilty of no offense. And you are also instructed that every entry upon the land of another without lawful authority is a trespass. If you should find that W. constructed any part of his fence upon the land of defendant without his consent, he would be a trespasser upon defendant's land, and defendant would have the right to remove so much of W.'s fence as was constructed upon the land of defendant, provided he, in doing so, provoked no breach of the peace.[5]

(1239) The court instructs the jury that if you believe from the evidence of the witnesses that ——— had leased the farm of W. for the year 19—, that he was for the time owner of said premises, and had the right to use the premises for his own convenience so that he did not use them to the injury of another, and in the use of the same he had a right to open the fence for his own convenience, and if you believe from the evidence that defendant cut the fence of W. for his own convenience, and not maliciously for the purpose of injuring W., you will acquit. If you have a reasonable doubt as to defendant's guilt you will acquit.[6]

[4] Approved in Tubbs v. Ogden, 46 Iowa, 134. This and the two preceding instructions are based on a local statute.

[5] Approved in Jones v. State (Tex. Cr. App.) 20 S. W. 926.

[6] Approved in White v. State, 27 Tex. App. 638.

CHAPTER LXIV.

FIDELITY BONDS.

Liability on bond of town treasurer, 1240.
Liability of sureties dependent on whether loss occurred while officer acting without scope of his employment, 1241-1243.

Liability on bond of county treasurer.

(1240) The court instructs the jury that township treasurers under the laws of this state are public officers, appointed by the board of trustees in their respective townships; that such treasurers, after they are so appointed and qualified, are the legal custodians of all books, papers, notes, due bills, mortgages, moneys and all other evidences of indebtedness to the townships, of which they are treasurers, subject to the control of the board of township trustees; that such treasurers are bound by law to make full and complete reports and exhibits of all books, papers, notes and other evidences of indebtedness, to said board of township trustees, for their inspection, and that the treasurer is at all times subject to removal by said board for any failure on his part to perform any of the duties required of him by law or by the by-laws, resolutions, orders or instructions of the said board; that while the treasurer is the custodian of such funds and securities, the township trustees are the guardians of the same, and at all times have the legal authority to control and manage the same, and if the jury believe from the evidence that the defendant (acting under the orders and requisitions of the township trustees entered upon the records, and signed by their president and clerk, made misapplication or misuse of such funds of the township on behalf of whom the plaintiff has brought this suit for the alleged misapplications, then the jury are instructed that the trustees of such township and plaintiff in this suit, are personally

liable for the misapplication of such funds, and that under such circumstances defendant would not be liable.[1]

Liability of sureties dependent on whether loss occurred while officer acting without scope of his employment.

(1241) The court instructs the jury that defendant contends that the loss in this case is not covered by the bond. It is said that section 7 of the by-laws does not provide that the general manager shall receive or handle money, and it is also claimed, and is a fact, that there is another by-law which prescribes the duties of the treasurer in reference to receiving money. It says: "It shall be the duty of the treasurer to receive all moneys due the association and to keep an account of the same," with some other duties, and on that it is contended on behalf of the defendant that the loss that occurred here, occurred not in connection with the duties of the general manager; that they did not agree to be responsible for the dishonesty of the general manager outside of his duties as general manager, and it is claimed that those are defined in this section 7 of article 2 of the by-laws.[2]

(1242) You will have to determine the question as to whether the loss in this case is, or is not, in whole or in part, covered by this contract; for while it is the duty of the court to construe written contracts, yet in this case the language is so general, and by its very terms, is in such a way made to depend upon statements outside of itself, that the court cannot determine the question whether the loss that occurred in this case is covered by this contract or not. The court can construe the meaning of the terms of the contract but it is for the jury in this case to apply the subject-matter of the controversy here and determine whether it is covered by

[1] Approved in Board of Trustees of Township 13 S., R. 3 W., v. Misenheimer, 78 Ill. 22.

[2] Approved in Harrisburg Savings & Loan Ass'n v. United States Fidelity & Guaranty Co., 197 Pa. 177.

the contract or not, and you will have to determine that from all the facts in this case that bear upon this question.[3]

(1243) The court instructs the jury that you will have to determine whether, and in connection with all the other evidence heard, the loss that has been shown to have occurred here, is covered by this contract or not; whether the parties were contracting in the first place about the loss of money at all; whether there is anything in section 7 of article 2, defining the duties of the general manager about the handling of money, whether the defendant was relying upon that as specifying and including all the duties of the general manager, or whether these statements contained in this, as to the way in which the money was handled, etc., whether that was notice to them that the plaintiffs understood, and whether it was notice from which they are assumed to have understood, that they were guarantying against the handling of money, it is a matter which you have to determine.[4]

CHAPTER LXV.

FIRES.

Care required, 1244.
Liability of municipality for destruction of made lots by fire communicated from inflammable material in streets—Example of series of instructions, 1245-1259.

Care required.

(1244) The court instructs the jury that fire is an agent of exceedingly dangerous and unruly kind, and the necessities of society require that in its use, care, skill and diligence should be used by the person using it, and to prevent injury to others by it, and the law requires of those who use

[3] Approved in Harrisburg Savings & Loan Ass'n v. United States Fidelity & Guaranty Co., 197 Pa. 177.

[4] Approved in Harrisburg Savings & Loan Ass'n v. United States Fidelity & Guaranty Co., 197 Pa. 177.

it as a propelling power, or for the purpose of generating steam, the utmost care in the use of all reasonable and proper means to prevent damage to the property of third persons, together with all such means and products as skill and science have discovered, provided its means under the circumstances should reasonably have been adopted by the defendant.[1]

Liability of municipality for destruction of made lots by fire communicated from inflammable material in streets—Example of series of instructions.

(1245) The court instructs the jury that in this case the plaintiff seeks to recover damages from the borough of ——— for negligently, as the plaintiff contends, destroying his lots or lot, situate on ——— street. It seems the plaintiff is the owner of some land adjoining this new bridge, which you have viewed, some ninety-seven feet in front, separated into two parts by a forty-feet lot owned by another party. The contention of the plaintiff is that these lots were in good condition, were up level with the street, free from fire, and that the borough, acting through its officers, negligently caused fire to be communicated to his lots or lot, and destroyed them, both by the fire and digging in the lots to prevent the fire from spreading to other property.

(1246) The court instructs the jury that the gist of this action is negligence. It is contended that the borough of ——— has been careless in the management of the streets in that neighborhood, and that it was by reason of this carelessness that the fire was communicated to the property of the plaintiff. The land in this neighborhood was a cinder dump, according to the testimony of all the witnesses, extending along the banks of the river. There had been iron mills in operation a number of years ago, and the ashes from the puddling and heating furnaces were hauled out upon this

[1] Read v. Morse, 34 Wis. 315.

dump, and evidently considerable material containing carbon was in it. Plaintiff's lots were composed of the same material. The dump extended on eastward from his property.

(1247) The court instructs the jury that the plaintiff's contention is that these lots were in good condition; that by the negligent act of the borough officers, in filling up a part of old ——— street, they allowed ashes and garbage containing about everything you could name that could come from the town, to be dumped upon this street, much of it being inflammable matter; that burning material was hauled and dumped there and covered over by a man leveling the dump, who, one of the witnesses characterized as "the borough man." It is contended by the plaintiff that this was the cause, the origin of the fire, and that the borough, having knowledge of the material of which this dump was composed, and also of the road which they were making, was negligent, in the first place, in causing the fire, and in the second place, in allowing it to continue.

(1248) The court instructs the jury that if you find that the borough started or caused the fire, it would be responsible for the result of it. (If you find that the borough did not start the fire, but it was carelessly and negligently allowed by it to be communicated to the property of the plaintiff, it would be responsible for that, and should respond in damages to whatever amount the plaintiff has sustained.)

(1249) The court instructs the jury that the first question, we apprehend, you will have to determine will be where the fire started and how. We do not propose to recite to you the testimony of the witnesses. You have heard them all, and we have been assisted by able counsel in this case all the way through; they have thoroughly discussed the matter before you, and I have no doubt rendered all the assistance in their power to have you arrive at a proper conclusion as to the origin of the fire, the plaintiff contending that it was caused by this burning material hauled out upon the dump,

the defendant contending that was not the cause of the fire at all, but that the fire had been in this dump many years, one witness going back to the fifties, another to 1879, and another placing the fire along the line of the river farther on and where the dump was made by the borough. You will have to take the testimony of all these witnesses and determine where it was that that fire started and how. If you find as we have said, that the fire was started by the borough, then it is responsible. If it was not started by the borough, then you go a step further and ascertain whether or not the borough was careless and negligent in the handling of it.

(1250) The court instructs the jury that the plaintiff contends that this fire was of small size and known to the officials, as the supervisor was about there, and that, as one witness put it, it could have been put out in a few hours' time. It is necessary for that knowledge to be brought home to the officers of the borough unless it actually, through its agents, caused the fire. If the officials had knowledge of this fire, did they act as prudent, careful men would under the circumstances? That is the rule which guides all people, borough officials and men in private station. If you seek to hold a man guilty of negligence, you must show that he has not acted as a careful, prudent man would under the circumstances, that is, an ordinarily prudent and careful man. . So you will have to take into consideration all the circumstances connected with the fire, the character of the material on the land, the distance from other properties, and the knowledge which an ordinary man would have of putting a fire out of that kind. This was not an ordinary fire such as we have fire apparatus to combat, as buildings, but it was a subterranean fire running under the surface of the ground. It will be for you to say whether or not this borough council acted as careful, prudent men would under the circumstances, in the extinguishment of the fire. If it

did, then the borough is not responsible for the spread of the fire.

(1251) The court instructs the jury that the evidence on the part of the defendant is that when this fire was discovered in 1893 (it was discovered in November, 1892, by the plaintiff's witnesses), operations were commenced with a view to extinguish it by water; that they opened fire plugs in the town and conducted the water there by hose; that they dug trenches and ran the water in those and used means of this kind for months; that they were unsuccessful, and the fire still continued to work its way westward, and finally came upon the plaintiff's property.

(1252) The court instructs the jury that if the fire got into the plaintiff's property without any fault of the borough, we should say to you that it had a perfect right to go there and remove his property, dig it out, haul it away, or do any other thing that was necessary, and that would accomplish the object of putting out the fire and preventing its spread to neighboring properties. The evidence is that there were some twenty-one houses that were endangered by the spread of the fire direct. Besides, the smells that arose from it constituted an annoyance to the whole neighborhood and a nuisance to the town. The borough would have the right if free from fault, to go upon the property and do as it did to cut off the fire.

(1253) The court instructs the jury that you understand the reason for that. Suppose in a row of houses connected together the end house should start to burn. When the fire company would come there, that is the borough acting through a fire company, it would have a perfect right to destroy the second house in order to save the balance of the row. The reason of that is plain. If it was not destroyed by tearing down, it would be by burning. There it is a matter of public necessity. The building is destroyed and the owner must suffer the loss without remedy against the borough.

So here plaintiff must stand this loss, if this fire was in his lot without the negligence of the borough. The great question for you to determine is, did the borough set it on fire? Or, second, did it carelessly or negligently allow it to approach his lot? If it was through its negligence that it got into his lot, the digging of his lot away would not relieve it from responsibility for its acts.

(1254) The court instructs the jury that the defendant's contention as we stated it, is that the fire did not originate as the plaintiff says; that it had been there for years, that it originated on the ——— lots, and was communicated from there through underneath the surface to the property of the plaintiff, and that the borough exercised all the care and diligence that a reasonably careful and prudent man would under the circumstances. Lastly the borough claims that even if the property was burned, that the plaintiff has sustained no damage, because his lots are now worth as much, if not more, than they were before.

(1255) The court instructs the jury that if they find that the defendant is responsible for this fire and the destruction of the property, you come then to the last question in the case, what are his damages? There is evidence on the part of plaintiff that the property was worth $2,500, and that now it is worth nothing. W. testifies it was worth $300 for a twenty-foot lot, now worth nothing. D. said it was worth $2,500, now worth nothing. K. testifies it was worth $1,500 to $2,000, now worth nothing. That is only part of the testimony in the case; we do not pretend to cite it all; we simply cite some of the witnesses and recall it to your memory. You will remember all that has been testified on that subject.

(1256) The court instructs the jury that one of the defendant's witnesses stated that the property had no value before, and now it has some value, because the inflammable material was off the property, burned off, and it is now safe

for a man to build a house there, which it was not before. M. thought the property was worth $10 a foot, and now it is worth nothing. S. thought it was worth $300, but was worth more afterwards than before the fire. He gave, we believe, as a reason, that a foundation could be secured to build upon the property. O. thought it was worth from $10 to $12 a foot.

(1257) The court instructs the jury that there is evidence on the part of the defendant that this property could be restored to its former condition without cost to the plaintiff. That is a question you will have to determine. The plaintiff claims it could not be restored at all, and that even if it were filled up with earth from excavations of cellars, it would require years for it to settle so that a safe foundation could be erected upon it; also, that the fire is there surrounding the property on two sides; that therefore, it is not at all desirable for building purposes, and that a man would not, under the circumstances, erect a building upon the property. The burden in all cases rests on the plaintiff to prove to a jury that the defendant is negligent, and also to prove the amount of his damages; in other words, when a man comes into court, he should show by the weight of the testimony that his contention is worthy of belief.

(1258) The court instructs the jury that if you find the plaintiff has sustained damages and that the defendant is liable for those damages, then you must assess them, and the measure of those damages would be the cost of the restoration of those lots by plaintiff if they can be restored, unless that cost equals or exceeds the depreciation in the value of the property, in which event the depreciation would be the measure of damages. If the lots cannot be restored, then the depreciation or the value of the property destroyed would be the measure, and whether they can or not is a question for you to decide under all the testimony in the case.

(1259) The court instructs the jury that this fire occurred

some years ago, and the testimony of the witnesses was necessarily not consistent. If you go back five or six years it is very difficult for honest, well-meaning people to agree on dates and times for the happening of certain events. We have found that illustrated in this case. It is for you to say which of these men have told the truth. Many of them may have supposed they were telling it, but there are discrepancies in the testimony which it is necessary for you to reconcile, or to determine who of them you will believe and who not. The credibility of the witnesses is always for the jury, and with that the court has nothing to do.[2]

CHAPTER LXVI.

FORMER ADJUDICATION.

In general, 1260, 1261.

In general.

(1260) The court instructs the jury that the judgment rendered in the circuit court of the United States in favor of ——— and against the ——— Insurance Company is conclusive as to the liability of the defendant in this case upon its policy of reinsurance, unless the jury, from all the evidence in the case believe, that such judgment was obtained by fraud, or collusion between said ——— and said insurance company.[1]

(1261) The court instructs the jury that fraud or collusion cannot be presumed, but must be proved by evidence satisfactory to the jury; and the burden of such proof is on defendant, but need not be made by direct testimony, but may be inferred by the jury from all the facts and circumstances shown in the cause.[2]

[2] Series approved in Grow v. Pottsville Borough, 197 Pa. 337.

[1] Approved in Strong v. American Central Life Ins. Co., 4 Mo. App. 7.

[2] Approved in Strong v. American Central Life Ins. Co., 4 Mo. App. 7.

CHAPTER LXVII.

FRATERNAL AND MUTUAL BENEFIT ASSOCIATIONS.

Concealment of facts by insured, 1262.
Expulsion of member, 1263.

Concealment of facts by insured.

(1262) The court instructs the jury that if they shall find from the evidence, that the deceased, the plaintiff's intestate, was before and at the time of his admission as a member of the defendant association in a bad state of health, and that the deceased knew that he was in such state of health and concealed such fact of his bad health from the defendant, then the plaintiff is not entitled to recover in this action, provided the jury shall find from the evidence that the inability of the deceased to attend to business during the time for which benefits were claimed in this suit, was the result of his diseased condition and bad state of health existing at the time of his admission as a member of the defendant association.[1]

Expulsion of member.

(1263) The court instructs the jury that if they find the facts stated in the defendant's first prayer, which is made a part of this, and shall further find that charges were made against said R., as stated in the record of said defendant read in evidence to the jury, and that a committee was appointed to investigate such charges, and that proceedings were thereupon had, in accordance with the constitution and by-laws of the said defendant and that said R. was found guilty of said charges, and the said R. was expelled from said defendant, and said R. had notice of such charges and proceedings, and of his expulsion, and shall further find

[1] Osceola Tribe No. 11 of the Improved Order of Red Men v. Rost, 15 Md. 295.

that the constitution and by-laws of said society provided for and authorized said R. to appeal from said decision to the ———, and that R. did not appeal, then plaintiff is not entitled to recover in this action.[2]

CHAPTER LXVIII.

FRAUD.

What constitutes actionable fraud or deceit, 1264-1271.
False representations by a purchaser as to his financial ability, 1272.
False representation as to financial ability of another, 1273-1275.
False representations concerning profits of business, 1276.
Puffing, 1277.
Concealment in attempting a compromise of a litigation, 1278.
In sale of corporate stock, 1279-1282.
Action by purchaser against vendor for fraud in misstating amount of land sold, 1283.
Fraud as defense to action on contract, 1284.
Concealment from other party of certain terms of contract, 1285-1287.
Intent, 1288-1293.
Falsity of representations, 1294-1297.
Knowledge of falsity of statement, 1298-1303.
Scienter or bad faith, 1304.
Statements recklessly made, 1305, 1306.
Reliance on representations, 1307.
Materiality of facts misrepresented or concealed, 1308.
Right of plaintiff to rely upon statements, 1309.
Duty to investigate the truth of statements, 1310-1317.
Same—Statements as to financial responsibility of third person, 1318.
Representations as to the law, 1319.
Benefits accruing to defendant from fraud, 1320.
Privity of parties to transaction, 1321, 1322.
Fraud by one who occupies a fiduciary relation, 1323.
Representations concerning future events, 1324.

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[2] Osceola Tribe No. 11 of the Improved Order of Red Men v. Rost, 15 Md. 295.

Same—In sale of corporate stock, 1325.
Sufficiency of evidence, 1326-1330.

What constitutes actionable fraud or deceit.

(1264) The court instructs the jury that if they believe from the evidence that defendant made the representations alleged in the declaration, and plaintiff relied upon such representations as true to his pecuniary injury, and if the jury further believe from the evidence that such statements were false and that defendant knew of their falsity at the time of making them, and that plaintiff had no opportunity of ascertaining the truth, plaintiff is entitled to recover.[1]

(1265) The court instructs the jury that it is not essential that false assertions be made in express words, but that fraud may be accomplished by encouraging and taking advantage of a delusion known to exist in the minds of others.[2]

(1266) The court instructs the jury that the intentional misrepresentation of a material fact or the production of a false impression for the purpose of misleading, defrauding or obtaining an undue advantage of another, constitutes actionable fraud, and that in order to constitute misrepresentations for which an action will lie, there need not be actual words or positive assertions, but such misrepresentations may consist of acts or artifices intended and calculated to mislead.[3]

(1267) The court instructs the jury that if you find that the defendant P. in making the contract for the lease to plaintiff made positive statements as to the character of the farm, the number of acres of plow land, or the character of the marsh or the number of acres of good marsh and made such statements without knowing them to be true, and

[1] Richardson v. Gilson, 55 N. H. 623.
[2] Busch v. Wilcox, 82 Mich. 315, 46 N. W. 940.
[3] Bank of North America v. Crandall, 87 Mo. 208.

they were not true, and were relied upon by the plaintiffs, to his injury, then the plaintiffs are entitled to recover.[4]

(1268) The court instructs the jury that mere "dealing talk" which is not accompanied by some artifice to deceive the purchaser, or throw him off his guard, or some concealment of intrinsic defects not easily detected by ordinary care and diligence, does not constitute a cause of action in favor of plaintiff.[5]

(1269) The court instructs that it is incumbent on the person asserting the fraud to show not only a false statement or representation, but that such representation was made with intent to deceive, and that such deception was the result of the reliance of the person asserting the fraud upon the representation.[6]

(1270) The court instructs that if defendant made a false representation of a material fact susceptible of knowledge, knowing the statement to be false, or if he made such false statement as of his own knowledge when he does not know whether it is true or false with intention to induce plaintiff, in reliance upon such statement, to do or refrain from doing something affecting his pecuniary interests, and if the jury should further believe from the evidence that the plaintiff acted with reasonable prudence and did rely upon such false statement to his pecuniary hurt, they may find a verdict for plaintiff.[7]

(1271) The court instructs that plaintiff must show that the representations constituting the cause of action alleged by him were false, that defendant knew that such representations were false when he made them, that he made them with intent to deceive, that plaintiff acted in reliance upon such representations having a right to so rely, and that

[4] Middleton v. Jerdee, 73 Wis. 39.

[5] Reynolds v. Palmer (C. C.) 21 Fed. 433.

[6] McIntyre v. Buell, 132 N. Y. 192, 43 State Rep. 715.

[7] Busterud v. Farrington, 36 Minn. 320, 31 N. W. 360.

plaintiff in reliance upon such representations was thereby induced to change his position to his pecuniary damage.[8]

False representations by a purchaser as to his financial ability.

(1272) The court instructs the jury that where a person who knows himself to be insolvent, by means of fraudulent pretenses or representations obtains possession of goods under a pretense of purchase, with the intention not to pay for them but with the design to cheat the seller out of such goods, a fraud is perpetrated on the seller, which will enable him to sue for damages for the value of the goods.[9]

False representation as to financial ability of another.

(1273) The court instructs the jury that if a person makes an untrue statement to another, knowing it to be untrue, and the person to whom it is made has no knowledge of its untruth, but relies on such statement as true and acts upon the same, and is injured thereby, the person so making such statement is liable for the damages accruing to the party thus acting.[10]

(1274) The court instructs the jury that if they believe from the evidence that the defendant made representations as to the solvency of A., in answer to inquiries made by plaintiff and defendant knew that the plaintiff made such inquiries with a view to selling goods to A., and such representations were false and defendant knew they were false and plaintiff acted upon such representations to his harm, the verdict of the jury should be for the plaintiff.[11]

(1275) The court instructs the jury that if they find

[8] Babcock v. Libbey, 53 How. Prac. 255.

[9] Flower v. Farwell, 18 Ill. App. 254.

[10] Approved in Endsley v. Johns, 17 Ill. App. 466. This instruction should perhaps not be given except where the false representation made, if one was made, is admitted to be about a material fact and is made in answer to an inquiry by the plaintiff suing for the fraud. In such case the instruction need not state the necessity of care or prudence being exercised by the plaintiff.

[11] Endsley v. Johns, 17 Ill. App. 466.

from the evidence that defendant was inquired of by plaintiff with regard to solvency of A., and defendant knowingly suppressed the fact that A. was indebted to him in an amount nearly equal to the amount of A.'s property, or if they should find from the evidence that defendant spoke of such debt as a mere trifle in a manner calculated to quiet apprehension, they may find against the defendant for the value of goods sold on credit on the faith of such representations.[12]

False representations concerning profits of business.

(1276) The court instructs the jury that the fact that plaintiff did not and could not make any profits in operating the business during the time he owned and operated it, does not of itself prove the representations of defendant that he had, while he owned the business, made a certain amount of profits, to be false.[13]

Puffing.

(1277) The court instructs the jury that statements made by a seller of property as to its value or good qualities, however exaggerated they may be do not constitute fraud or deceit.[14]

Concealment on attempting a compromise of a litigation.

(1278) The court instructs that one who is trying to settle a litigation with his adversary has a right to keep his opinion on the merits to himself. The parties deal with each other at arm's length, and a party is not guilty of a fraud where he neither withholds nor misstates the facts, simply because the courts finally decide the law to be other than he claims it to be while engaged in litigation over the subject.[15]

[12] Viele v. Goss, 49 Barb. 96.
[13] Markel v. Mundy, 11 Neb. 213, 7 N. W. 853.
[14] Noetling v. Wright, 72 Ill. 390.
[15] Trustees of Amherst College v. Ritch, 151 N. Y. 282.

In sale of corporate stock.

(1279) The court instructs the jury that if they find from the evidence that the plaintiff paid the sum of $——— to the ——— Company for certain shares of stock in said company and shall find that the said plaintiff was induced to purchase said shares of stock in said company by the false representations and statements of the defendant, to the effect that the said shares of stock in said company were a safe and sure investment and would pay a high rate of interest and shall further find that such representations and statements were false and fraudulent and known to be false and fraudulent by said defendants and that plaintiff relied upon these said false and fraudulent statements and representations and was thereby induced to purchase said shares of stock, the plaintiff is entitled to recover, if the jury further find that the said plaintiff suffered loss and damage by reason of said false and fraudulent representations and statements.[16]

(1280) The court instructs the jury that in order to entitle the plaintiff to recover in this case the jury must find from the evidence that the defendants, with a view to induce the plaintiff to subscribe to or purchase the stock in the ——— Company, made representations to him with respect to the value of their assets and extent of their business, which were false in fact when made and that defendants had no reasonable ground to believe the same to be substantially correct when made and also that the same were made with the fraudulent intent to cheat and deceive the plaintiff and that the plaintiff had not at hand the means of verifying the truth of such representation and that in subscribing to or purchasing said stock, the plaintiff relied on such representations and would not have made such purchase except upon the faith of the same and that in consequence thereof he was misled and injured.[17]

[16] Approved in Robertson v. Parks, 76 Md. 118.

[17] Approved in Robertson v. Parks, 76 Md. 118.

(1281) The court instructs the jury that if the jury believe from the evidence that in the year ——— the defendants T. and P., formed a copartnership in the city of ——— under the name of ———, for the purpose of carrying on the ——— business and that thereafter the said firm of ——— dissolved for the purpose of continuing said business under the management of a company and to that end, on the ——— day of ———, 19—, the defendants together with H. formed a copartnership, known as the ——— Company, under the general incorporation law of the state for the object and purposes contained in the certificate of incorporation and the prospectus of said company offered in evidence and that after the organization of said company and the issue of stock to the defendants ———, ———, and ———, as mentioned in the evidence, the directors of said company inserted in the ——— on the ——— day of ———, 19—, the advertisement offered in evidence, soliciting subscriptions to the stock of said company, inviting an investigation of its affairs as therein mentioned, and that the plaintiff in response to said advertisement and with a view of purchasing stock therein, made inquiry into the extent and development of the ——— business in the city of ——— and also as to the financial responsibility and standing of the defendants and thereafter visited the office of said corporation on ——— street and at his request the defendant placed at his disposal all the ledgers, books of account, collection books and other records containing the transactions of said company, for the purpose of making examination of the same; and shall further find that the plaintiff is an expert bookkeeper or accountant and that he devoted two or three weeks to the examination of said books and records, and shall further find that defendant offered to the plaintiff any assistance or information which he might need in the examination or understanding of said books or records and that plaintiff declined said offer and preferred to make said examination without the assist-

ance of the defendants; and shall further find that after finishing the examination of said books and records, the plaintiff subscribed to fifty shares of the stock of said company; and shall further find that said books and records showed the assets and liabilities of said company, and also what part of said assets consisted of open accounts and bills receivable, over due and placed in the hands of attorneys or collection agents for collection, then the plaintiff is not entitled to recover in this action with respect to any representations made by defendants or any of them as to the character, consideration or value of such assets, accounts or bills so overdue and in course of collection as aforesaid.[18]

(1282) The court instructs the jury that if they find from the evidence that the defendants acted in their dealing with the plaintiff openly and in good faith and the plaintiff purchased ——— shares of stock in the ——— Company, a corporation in which the defendants were officers and further find that loss and damage resulted to the plaintiff by reason of such purchase of stock, the plaintiff cannot recover in this suit even should the jury believe from the evidence that said loss and damage was the direct result of the subsequent management of said corporation by the defendants.[19]

Action by purchaser against vendor for fraud in misstating amount of land sold.

(1283) The court instructs the jury that after the defendant had put the matter of selling his land in the hands of S., S. gave J. authority to employ brokers, if necessary, to effect the sale and J. gave to E., a real-estate broker, a circular containing a minute account of the property, which among other things stated in explicit terms that the land to be sold contained seven acres, and E. proceeded to advertise the property in newspapers as containing seven acres. This

[18] Approved in Robertson v. Parks, 76 Md. 118.

[19] Approved in Robertson v. Parks, 76 Md. 118.

advertisement brought plaintiff in this case to E.'s office and E. handed said circular to plaintiff as containing such information as he had received from J., at the same time telling the plaintiff that if he would go to the property that day he would find J. there ready to receive him and to show him whatever was to be seen. Information given by a seller or his agent through an advertisement in a newspaper or even a circular prepared for the purpose of being exhibited to the purchasers is not always to be regarded by the buyers, if they are reasonably cautious, as containing the exact truth, but statements which exceed the boundary of truth and relate to material facts should be avoided and in all such cases there are two questions to be considered—first, that the seller said what was not true, and second, that the buyer relied upon what was said. When the plaintiff met J., he proceeded to question J. explicitly and asked whether the premises in question contained the seven acres spoken of. J. replied that they contained more rather than less, and the question was again asked subsequently and answered in the same way. The offer made by plaintiff for the property was accepted by the defendant and the conveyance was executed. On this state of facts there arises three principal questions to be decided by the jury: in the first place, did S., as defendant's agent so far empower J. to act for defendant in the sale of the premises as to render defendant responsible for what J. said and did; second, did J. state what he did not know to be true and what was in fact false, without having any reasonable ground for believing it; third, was this statement credited and believed by plaintiff, did it influence him in buying and induce him to give a larger sum than he otherwise would have consented to pay. Unless all three of these propositions are found affirmatively by the jury, they should render a verdict for defendant; if they are so found, the jury may give a verdict for plaintiff, if upon the other particulars of the case, they find in favor of plaintiff.[20]

[20] Griswold v. Gebbie, 126 Pa. 353.

Fraud as defense to action on contract.

(1284) The court instructs the jury that as regards the defense set up in this case that the contract sued on was obtained from the defendant by false and fraudulent representations, the court instructs the jury that to defeat a recovery on that ground, the jury must believe, from the evidence, that the alleged representations were made as charged, and that they were false when made, and that the plaintiff knew them to be false,—that they were such as a man of ordinary prudence would be likely to rely upon, and that the defendant did rely upon the truth of them, and was induced thereby to execute the contract in question.[21]

Concealment from other party of certain terms of contract.

(1285) The court instructs the jury that the plaintiff sues to recover the sum of $———, alleged to be due plaintiff from defendant as a balance due upon a certain contract. The defendant claims a set-off under a certain alleged provision of the contract. The plaintiff replies and says that the particulars of the contract under which defendant asserts his set-off were not read to plaintiff by defendant when plaintiff signed the same. That plaintiff relied upon defendant to read said contract and that defendant practiced a fraud upon him and that plaintiff did not read the contract himself.

(1286) The court instructs the jury that, if you are satisfied from the evidence that defendant failed to read the ——— part of said articles of ———, and thereby intentionally deceived the plaintiff and plaintiff relied upon said reading as correct and did not know that the articles contained said ———, or should contain said ———, and was thereby deceived and induced to sign said articles, when otherwise plaintiff would not have so signed said articles, then you may be justified in disregarding and should disregard defendant's claim on account of said ——— and your verdict

[21] Approved in Grier v. Puterbaugh, 108 Ill. 602.

should be for the plaintiff for the $——— with interest from the date it was payable at ——— per cent. per annum to the first day of his term.[22]

(1287) The court instructs the jury that, on the contrary, if you are not satisfied by the evidence that the defendant intentionally omitted to read the ——— part of said papers constituting the contract, then the presumption is that defendant read the whole of the contract and you should find for defendant. And if beyond this you are satisfied from the evidence that defendant read all the ——— parts of said contract before and in the hearing of plaintiff, and plaintiff signed said contract without informing himself as to the meaning of all the terms of the contract, and defendant intended no fraud on plaintiff, then you should find for defendant, as plaintiff should not have so signed without being informed and should suffer from his own error.[23]

Intent.

(1288) The court instructs the jury that the intent to deceive may be inferred from the fact that the representations made by the defendant were known by him to be false, or from the fact that the defendant had no reason to believe that his representations were true.[24]

(1289) The court instructs the jury that every party must be deemed to have intended the natural and inevitable consequences of his acts, and where his acts are voluntary and necessarily operate to defraud others, he must be deemed to have intended a fraud.[25]

(1290) The court instructs that if the jury should believe from the evidence that defendant made a false representation respecting property sold to plaintiff, without rea-

[22] Riley v. Melquist, 23 Neb. 474.

[23] Approved in Riley v. Melquist, 23 Neb. 474.

[24] Frisbee v. Fitzsimons, 3 Hun, 674; Johnson v. Wallower, 18 Minn. 288.

[25] Coursey v. Morton, 132 N. Y. 556, 43 State Rep. 673.

sonable and probable cause for believing it to be true and with intent to induce the purchase, they may find the representation to be fraudulent, unless the defendant shows that he was led into making the representation by mistake.

(1291) The court instructs that if the jury believe from the evidence that defendant made false and fraudulent representations respecting the credit and circumstances of another, and that by reason of such representations plaintiff was induced to give credit to such person, they may find for plaintiff, though defendant may not have had an intent to defraud plaintiff.[26]

(1292) The court instructs the jury that even if the jury believe that the ——— was insolvent on the ——— of ———, 19—, and shall further find that at said date the defendant represented to the plaintiff that it was solvent, the plaintiff is not entitled to recover by reason of any such representations unless they find that such representation was falsely made for the purpose of practicing a fraud upon the plaintiff.[27]

(1293) The court instructs the jury that it is necessary for the plaintiff to show knowledge on the part of defendant of the falsity of the representations alleged to have been made by him to plaintiff and relied upon as a cause of action, or else a reckless disregard of the consequences of his statements or culpable omission to investigate the truth of such statements, and that the issue is whether the representations alleged to have been made were false and fraudulent, but that if the jury believe from the evidence that fraudulent misrepresentations were made to plaintiff by defendant and plaintiff acted upon such representations to his damage, the

[26] Body's Ex'rs v. Browne, 6 Pa. (6 Barr) 310.

[27] Approved in Susquehanna Fertilizer Co. of Baltimore City v. White & Co., 66 Md. 444.

plaintiff may recover though there is no direct evidence of an intent to deceive.[28]

Falsity of representations.

(1294) The court instructs the jury that the mere fact that a representation is literally true affords no excuse to the party making it, if made with the intention to deceive another, and such other is deceived and thereby receives an injury.[29]

(1295) The court instructs that if the jury believe from the evidence that the defendant made the alleged false representations, and plaintiff relied upon such representations to his pecuniary prejudice, they may find for the plaintiff though the defendant professed to rely upon representations of others and gave the source of his information, if he knew, or had reason to believe that his statements were untrue.[30]

(1296) The court instructs the jury that in order to establish a case of false representations, it is not necessary that things which are false should be stated as if they were true, but where the presentation of that which is true creates an obvious impression which is false, one who seeks to profit by the misapprehension thus produced, may be found guilty of having made false representations.[31]

(1297) The court instructs the jury that if they believe from the evidence that the defendant made the alleged representation, whereby plaintiff was induced to give credit to (A), then the jury must further believe in order to find for plaintiff, that the defendant stated as true what was not true, or that the facts and circumstances as known to defendant

[28] Schoefield Gear & Pulley Co. v. Schoefield, 71 Conn. 1, 40 Atl. 1046.

[29] Denny v. Gilman, 26 Me. (13 Shep.) 149.

[30] Hanscom v. Drullard, 79 Cal. 234, 21 Pac. 736.

[31] Lomerson v. Johnston, 47 N. J. Eq. (2 Dick.) 312, 20 Atl. 675, 24 Am. St. Rep. 410.

were insufficient to induce a reasonable man to believe the statements made to be true.[32]

Knowledge of falsity of statement.

(1298) The court instructs the jury that to constitute a fraudulent representation, the party making it must know it to be untrue, or must represent as true, of his own knowledge, matters as to the truth or falsity of which he has no knowledge, or must represent as true that which is false, and the truth or falsity of which he is presumed to know.[33]

(1299) The court instructs the jury that every false affirmation does not amount to fraud. Knowledge of falsity of representations must rest with the party making the statement and he must use some means to deceive or circumvent.[34]

(1300) The court instructs the jury that if they believe from the evidence that the defendant at the time of making the representations alleged as a cause of action, knew such representations were false, or had no knowledge of their truth or falsity, or did not believe them to be true, or, if the jury believe from the evidence that defendant having no knowledge of the truth or falsity of the statements, yet represented them to be true of his own knowledge, or if the defendant without asserting knowledge in express terms presumed to have it and speak from it, or intended to and did convey the impression that he had actual knowledge of the truth, though conscious that he had not, then the jury should find against defendant.[35]

(1301) The court instructs that if the jury believe from the evidence that defendant had reason to believe that the statements made by him to plaintiff and alleged as the cause of action were false, the fact that he had such reason to so

[32] Sims v. Eiland, 57 Miss. 607.

[33] Brooks v. Hamilton, 15 Minn. 26.

[34] Walker v. Hough, 59 Ill. 375.

[35] Bullitt v. Farrar, 42 Minn. 8, 43 N. W. 566, 18 Am. St. Rep. 485, 6 L. R. A. 149.

believe is a circumstance to be considered with the other circumstances upon the question whether the representations were made with fraudulent intent.[36]

(1302) The court instructs that if the jury believe from the evidence that the defendant made a false statement not knowing that it was false, but knowing facts sufficient to put him upon inquiry, he is liable for the consequences, to the same extent as if he had actual knowledge.[37]

(1303) The court instructs the jury that if they believe from the evidence that defendant represented that the property sold contained a certain number of feet of timber and that the defendant made the further statement that he knew that there was a stated amount of timber upon the land because he had sent experienced persons to examine the land and if the jury further believe from the evidence that the defendant did not actually believe the fact to be as stated or had no reasonable ground for supposing such to be the fact they should find against the defendant.[38]

(1304) The court instructs the jury that if they believe from the evidence that defendant made certain representations concerning the property sold in regard to matters material and beneficial to the plaintiff and these statements were untrue, and defendant knew that the statements were untrue or had no reasonable ground for believing that such statements were true and if plaintiff had no opportunity for finding out whether the statements were untrue, then the jury should find against defendant.[39]

Statements recklessly made.

(1305) The court instructs the jury that if they should believe from the evidence that defendant represented to the

[36] Salisbury v. Howe, 87 N. Y. 128.

[37] Craig v. Ward, 1 Abb. Ct. App. Dec. 454, 3 Abb. Pr., N. S., 235, 3 Keyes, 387.

[38] Glaspie v. Keator, 56 Fed. 203, 5 C. C. A. 474, 12 U. S. App. 281.

[39] Bondurant v. Crawford, 22 Iowa, 40.

plaintiff that if he pursued a certain course, plaintiff would be cured of a disease with which he was afflicted, and the defendant made such statement without knowing the truth or falsity of the representation, and plaintiff relied upon the statement and pursued the treatment, but was not cured and suffered pecuniary loss, defendant is liable for deceit.[40]

(1306) The court instructs the jury that where a person makes a false statement, not knowing the statement is false, but knowing facts sufficient to put him upon inquiry, he is liable for the consequences to the same extent as if he had actual knowledge.[41]

Reliance on representations.

(1307) The court instructs the jury that in order to recover for the alleged false representations made by the defendant, plaintiff must show that he was induced to make the purchase relying solely upon the false representations of the defendant, or that he was induced to make the purchase by the false representations of the defendant and certain information received from some other source. If it appears that the plaintiff did not trust the false statements but acted alone upon information received from other sources, the jury should find for defendant.[42]

Materiality of facts misrepresented or concealed.

(1308) The court instructs that in the absence of a more positive standard by which to determine whether the fraud is of a material character, a good rule is as follows: If the fraud be such that had it not been practiced, the contract would not have been made or the transaction completed, then it is material, but if it be shown or made probable that the

[40] Hedlin v. Minneapolis Medical & Surgical Inst., 62 Minn. 146, 64 N. W. 158, 35 L. R. A. 417.

[41] Craig v. Ward, 1 Abb. Dec. 454.

[42] Becraft v. Grist, 52 Mo. App. 586.

same would have been done in the same way if the fraud had not been practiced, it cannot be material.[43]

Right of plaintiff to rely upon statements.

(1309) The court instructs the jury that a misrepresentation must not only be in something material, but it must be with reference to something in which one party places a known trust and confidence in the other. The representation must not be a mere matter of opinion equally open to both parties for examination and inquiry, where neither party has presumed to trust to the other, but to rely upon his own judgment.[44]

Duty to investigate the truth of statements.

(1310) The court instructs the jury that the law requires every person to exercise reasonable prudence in business affairs and that before a party can be relieved from obligations of a contract upon the ground of fraud, it must appear that he exercised reasonable care and prudence to learn the nature of the contract before executing it, and that if the jury should believe from the evidence that defendant had full opportunity to read the contract before signing it and was not induced to sign it by false statements made by plaintiff, defendant could not be afterwards permitted to deny knowledge of the contents of the contract.[45]

(1311) The court instructs the jury that the plaintiff must be held to have had knowledge of such faults in the articles purchased from the defendant as were not concealed or covered up but were open to view and discoverable on ordinary inspection, and that though the jury should believe from the evidence that the defendant made a highly exaggerated or false description of the article sold, yet if the matters concerning which the representation was made were open to

[43] McAleer v. Horsey, 35 Md. 439.
[44] Tuck v. Downing, 76 Ill. 71.
[45] Linington v. Strong, 107 Ill. 295.

inspection by the plaintiff, the jury must find for the defendant.[46]

(1312) The court instructs that though the jury may believe from the evidence that the representations made by the defendant and alleged as the cause of action were false, the jury cannot find for plaintiff unless they further believe from the evidence that the defendant believed or had reason to believe that the statements were false, and the jury must further find that the representations influenced plaintiff. A false representation will not authorize recovery if the plaintiff has an opportunity of ascertaining the truth.[47]

(1313) The court instructs the jury that if they believe from the evidence that the real quality of the land sold by the defendant to plaintiff, was obvious to a person of ordinary intelligence; that both the plaintiff and defendant had equal knowledge or equal means of acquiring information, and if they believe that nothing was said or done by the defendant to throw plaintiff off his guard, or to divert him from making inquiries and examination such as a prudent man ought to make, and if they believe that plaintiff omitted to make such inquiries, and omitted to avail himself of the opportunities at hand for ascertaining the truth, they must find for the defendant.[48]

(1314) The court instructs the jury that if they believe from the evidence that plaintiff had an opportunity by reasonable diligence to ascertain the truth and to determine for himself the facts concerning which the false representations by defendant were made, the jury shall find for the defendant, unless it appears that defendant used some fraud, artifice, trick or deceit to throw plaintiff off his guard and prevent his making proper inquiries.[49]

[46] Van Velsor v. Seeberger, 35 Ill. App. 598.
[47] Furman v. Titus, 40 N. Y. Super. Ct. (8 Jones & S.) 284.
[48] Long v. Warren, 68 N. Y. 426.
[49] Hitchcock v. Baughan, 36 Mo. App. 216.

(1315) The court instructs the jury that where one having peculiar knowledge of the subject makes representations touching it to another having no knowledge thereof, which operate as an inducement to him to enter into a contract with the maker of the representations involving such subject, he may rely upon such representations and is not required to make inquiry or investigate as to their truth.[50]

(1316) The court instructs the jury that if they should believe from the evidence that circumstances existed which would reasonably excite suspicion as to the truth of the statement by defendant or lead to inquiry, still they should find for the plaintiff if they further believe from the evidence that by reason of artifices on the part of the defendant, the plaintiff's suspicions were lulled and inquiry was prevented.[51]

(1317) The court instructs the jury that if they should believe from the evidence that defendant made certain false representations concerning certain qualities of the articles sold by defendant to plaintiff, and the matters concerning which the representations were made could be positively determined, but were not readily open to the observation of the plaintiff, and if the jury should further believe from the evidence that the representations were made with intent to deceive and were relied upon by the plaintiff, the jury should find for the plaintiff.[52]

Same—Statements as to financial responsibility of third person.

(1318) The court further instructs the jury that it was the duty of the plaintiff, before acting upon any representations made to him concerning ———, if any such representations have been proven, to have exercised ordinary care and caution to guard against deception and fraud, and if he could by the exercise of ordinary care and caution have

[50] Clark v. Ralls, 24 N. W. 567.
[51] Burr v. Willson, 22 Minn. 206.

ascertained the falsity of any statements or representations made to him, and he failed to do so, then he is not entitled to recover in this action, and the jury should find for the defendant, unless you believe from the evidence that the alleged statements of defendant were of such character as to induce plaintiff to rely entirely on their truth, and to induce plaintiff not to make such investigation as a reasonably prudent man would make under different circumstances.[53]

Representations as to the law.

(1319) The court instructs the jury that a representation of what the law will or will not permit to be done, is one upon which the party to whom the statement is made has no right to rely and if such party does so rely on the truth of the statements, he cannot ask the law to relieve him from the consequences.[54]

Benefits accruing to defendant from fraud.

(1320) The court instructs the jury that it is not necessary in order to find against the defendant, that defendant should have any interest in the result of the fraud, or should derive any benefit therefrom.[55]

Privity of parties to transaction.

(1321) The court instructs that if the jury should believe from the evidence that defendant made false and fraudulent representations to (A.) with the expectation and purpose that they would be communicated to plaintiff, and they were so communicated to plaintiff and acted upon by the latter to his prejudice, the result of the fraud must be deemed to have been contemplated by the defendant, and they may find him liable therefor.[56]

[52] Faribault v. Sater, 13 Minn. 223.
[53] Approved in Endsley v. Johns, 17 Ill. App. 466.
[54] Fish v. Cleland, 33 Ill. 237.
[55] This is an action for deceit.
[56] Chubbuck v. Cleveland, 37 Minn. 466, 35 N. W. 362.

(1322) The court instructs the jury that it is not necessary that false representations in order to be actionable should be made to or with the intent to defraud any particular person, but that the person making such representations is liable to any one who relies thereon and is injured thereby.[57]

Fraud by one who occupies a fiduciary relation.

(1323) The court instructs the jury that if they believe from the evidence that a fiduciary relation existed between plaintiff and defendant, and if they further believe that defendant made a material misrepresentation concerning a transaction growing out of such relation to the plaintiff, and the plaintiff relied upon such misrepresentation to his harm, and such misrepresentation was made with intent to deceive, plaintiff may recover.[58]

Representations concerning future events.

(1324) The court instructs that where representations consist of mere expressions of hope, expectations and the like, a party to whom they are made is not legally justified in relying upon them and assuming them to be true, and if such representation is made the basis of an action for fraud, it must be shown that it was made with intent to deceive, and the presumption will be in the absence of such evidence that the person making the representation did so honestly, however extravagant his hope.[59]

Same—In sale of corporate stock.

(1325) The court instructs the jury that the plaintiff is not entitled to recover on account of any representations they may find the defendants, or either of them may have made to the plaintiff, that the stock of the ——— Company would

[57] Williams v. Wood, 14 Wend. 126; Cazeau v. Mali, 25 Barb. 578.
[58] Alexander v. Emmett, 169 Ill. 523, 48 N. E. 427.
[59] Kley v. Healy, 149 N. Y. 346; aff. jt. 9 Misc. 93, 59 State Rep. 692, 29 N. Y. Supp. 3.

pay as much as ——— per cent. dividend or for any other expression of opinion concerning the future value and profitableness of the business they were carrying on. The jury must exclude such representations as constituting a basis of recovery in this action.[60]

Sufficiency of evidence.

(1326) The court instructs that when the act charged comports as well with honesty as dishonesty, and the jury is in doubt as to the preponderance of the evidence, the scale being apparently balanced, such a doubt, if reasonable and substantial, shall be resolved in favor of defendant.[61]

(1327) The court instructs the jury that fraud is odious in contemplation of law and not to be presumed and the burden of proof is on the plaintiff to overcome such legal presumption by evidence satisfactory to the jury.[62]

(1328) The court instructs the jury that fraud may be proved by circumstantial evidence as well as positive proof. Express proof is not required but fraud may be proved from strong presumptive circumstances.[63]

(1329) The court instructs the jury that the burden of proving fraud is upon the person asserting it; fraud is not to be presumed without proof, yet fraud, like any other fact may be proved by showing such circumstances as lead fairly and naturally to the conclusion that fraud has been committed, and if such circumstances are proven and they are of such a character as to produce in the mind of the jury, a belief that fraud has been committed, then it may be considered that fraud has been proved. But before fraud can be proved by circumstances, the conclusion of fraud should be inconsistent with any other probable or reasonable theory.

[60] **Approved in Robertson v. Parks, 76 Md. 118.**
[61] **Shinnabarger v. Shelton. 41 Mo. App. 147.**
[62] **Approved in Robertson v Parks, 76 Md. 118.**
[63] **Strauss v. Kranert 56 Ill 254**

Fraud will not be imputed when the facts upon which it is predicated may be consistent with honesty and fair dealing.[64]

(1330) [The use of the word "conviction" in the instruction given in this case, was criticised as exacting too high a degree of proof.[65]]

CHAPTER LXIX.

FRAUDS, STATUTE OF.

Agreement to pay debt of another, 1331.
Oral modification of contract, 1332.
Lease for term not exceeding one year, 1333.

Agreement to pay debt of another.

(1331) The court instructs the jury that one person has a right by word of mouth to employ another to work for a third person. The person employed may properly do such work on the credit of the party making the contract of employment and not upon the responsibility of the party for whom the work is done, if there be a consideration for the contract, and if the jury believe from the evidence that defendant employed the plaintiff verbally to work for ——— and the plaintiff performed services for ——— in pursuance of the employment by the defendant, and that there was a consideration for the promise by defendant to pay for said services, then the plaintiff has a right to recover from defendant whatever the services rendered for ——— are reasonably worth. The provision of the statute of frauds which provides that contracts of suretyship for another shall be in writing is not a defense to the action by plaintiff to recover for such services.[1]

[64] Turner v. Hardin, 80 Iowa, 691.
[65] Turner v. Hardin, 80 Iowa, 691.
[1] Moshier v. Kitchell & Arnold, 87 Ill. 18.

Oral modification of contract.

(1332) The court instructs the jury that if they believe from the evidence that the contract which was alleged to have been made, by the terms of the oral agreement between the parties, could not be performed within one year from the date of the oral agreement, then it would not be good as a contract; it might be treated by the parties as a waiver of the right upon either side to insist upon immediate performance of the original written contract, but it would not be good as a contract to take the place of the original contract.[2]

Lease for term not exceeding one year.

(1333) The court instructs the jury that a lease of land by parol, for a term not exceeding one year, is valid and lawful. And if the jury believe, from the evidence, that some time in the latter part of May, or first of June, 19 —, and after the execution and delivery of the deed from plaintiff, G., to defendant, B., the defendant, by agreement with said plaintiff, took and received of said plaintiff the interest on the amount of certain notes from that date until the first of September then next following, for the use of the premises in question to that time, that such agreement constituted a valid lease of the premises, and entitled the plaintiff, G., to the possession of the premises from the date thereof until said first day of September.

[2] Barton v. Gray, 57 Mich. 622.

CHAPTER LXX.

FRAUDULENT CONVEYANCES.

I. What Constitutes.
In general, 1334, 1335.
Intent, 1336-1340.
Constructive fraud, 1341.
Badges of fraud, 1342-1345.
Secrecy, 1346.
Form of transfer, 1347.
Transactions not in usual course of business, 1348-1352.
Financial condition of grantor, 1353-1355.
Indebtedness of grantor, 1356, 1357.
Change of possession, 1358-1364.
Consideration, 1365, 1366.
Transactions based on consideration, 1367.
Conveyance to satisfy debt, 1368-1370.
Same—Absence of evidence of debt, 1371.
Dealings between relatives, 1372-1374.
Conveyance by husband to wife, 1375, 1376.
Conveyance of exempt property, 1377, 1378.
Knowledge of grantee, or fraudulent participation by him in fraud, 1379-1386.

II. Operation and Effect.
In general, 1387.
Inability to recover on notes given as consideration of fraudulent conveyance, 1388, 1389.
Rights of purchaser from fraudulent grantee, 1390-1392.

III. Presumptions and Sufficiency of Evidence.
Burden of proof as to fraud, 1393.
Burden of proof as to notice to grantee, 1394.
Presumption as to fraud, 1395.
Sufficiency of evidence, 1396-1399.
Same—Action by alleged fraudulent grantee against levying sheriff, 1400, 1401.

I. What Constitutes.

In general.

(1334) The court instructs the jury that whether a con

veyance of this character is fraudulent or not is a question of fact, to be determined on a view of all the circumstances attendant upon the making of the grant or conveyance, especially on the condition of the grantor as to property, and as to the amount of debts which were due and owing from him at the time he undertook to dispose of his estate, or a portion thereof, by gift, or without adequate consideration. On the one hand, it could not be properly adjudged that a voluntary conveyance was fraudulent and void, either as against existing or subsequent creditors, if it was proved to have been made by a person substantially free from debt and possessed of a large amount of property, who had no purpose to hinder or delay his creditors, whose sole motive was to transfer the property to his wife or children, so that it should not remain at the hazard of business or be subjected to the risk of improvidence. On the other hand, it would be very clear that a voluntary transfer of property by a person deeply indebted, and whose property was inadequate or barely sufficient for the payment of his debts, would furnish strong presumptive evidence of fraud, and if unexplained would be set aside as void against creditors.[1]

(1335) The court instructs the jury that if the sale of said ——— by P., and purchase by R., was not an honest and real sale and purchase, but was a sham transaction, or trade, made and gone into by them for the purpose of deceiving the creditors of P., or some of them, as to the real disposition to be made of the ———, they, P. and R., knowing the trade would have the effect to defraud some of P.'s creditors, or hinder or delay some of them in the collection of their claims against him, then such sale and purchase was fraudulent and void as to such creditors, though said R. may have given his note for the ———, and the note may have been applied or used in extinguishing some of the claims against P. Said R., under such circumstances,

[1] Approved in Winchester v. Charter, 102 Mass. 272.

and if such were the real character of the transaction, cannot, in law, be considered a purchaser in good faith, and if you find said sale and purchase to be substantially of the character above stated, or for other reasons or facts presented by the evidence find said sale and purchase to have been made with intent to hinder or delay some of P.'s creditors in the collection of their claims, then you should find said sale and purchase fraudulent and void as to the creditors of said P.[2]

Intent.

(1336) The court instructs that before the jury can find a conveyance is fraudulent in fact as against creditors, they must find that the grantor intended to defraud, hinder and delay creditors.

(1337) The court instructs that if the sole object of the conveyance was to pay debts, and the grantor had no intent to hinder creditors and did not know that such would be the result of making the conveyance, and merely meant to pay his debt without thinking of the effect upon creditors, the conveyance is not fraudulent.[3]

(1338) The court instructs that the intent of a debtor to hinder and delay creditors will render a conveyance void, irrespective of the intent to defraud.

(1339) The court instructs that if the operation of the conveyance in question is to hinder, delay or defraud creditors, the jury may infer an intent on the part of the parties to so hinder, delay or defraud.[4]

(1340) The court instructs the jury that a conveyance or sale of property, made with intent, on the part of the vendor, known to the vendee and participated in by him, to delay, defeat, hinder or defraud a particular creditor from obtaining his debt, though made for a valuable and full considera-

[2] Approved in Wadsworth v. Walliker, 51 Iowa, 605.
[3] Lapham v. Marshall, 51 Hun, 36, 3 N. Y. Supp. 601.
[4] Greeleaf v. Edes, 2 Minn. 264 (Gil. 226).

tion, is fraudulent and void as against such creditors, or any creditors who have been thus hindered or delayed.[5]

Constructive fraud.

(1341) The court instructs that fraud in law consists in acts which though not fraudulently intended, yet amount to actual fraud because of their tendency to defraud creditors by vesting the property of the debtor in his grantee.[6]

Badges of fraud.

(1342) The court instructs the jury that an assignment of all a man's property, when he is largely in debt, naturally excites suspicion of fraud, and is therefore evidence of fraud. If there be a judgment just ripening for execution at the time of the assignment, this increases the suspicion, and adds to the weight of the evidence. If the transaction is between relatives, the transaction is still more suspicious because the grantee is supposed to be better acquainted than other people with the embarrassed circumstances of the grantor. Yet you may think it not unreasonable that a relative should buy out one who is succeeding badly in the business in which he is engaged.[7]

(1343) The court instructs that fraud is never presumed, but must be proved by the party asserting it. It is very seldom that fraud can be established by direct evidence, and it is usually shown, if at all, by circumstantial evidence. There are certain facts or things which the law denominates badges of fraud; for instance, if a party in failing circumstances or largely indebted should make a sale of his goods to a near relative; or, if he should sell for a price greatly inadequate in value; or, if a sale should be made on an unusually long credit or to an irresponsible person without being secured; or, if made in unusual haste and

[5] Approved in Nelson v. Smith, 28 Ill. 495.

[6] McKibbin v. Martin, 64 Pa. (14 P. F. Smith) 352, 3 Am. Rep. 588.

[7] Forsyth v. Matthews, 14 Pa. 100.

not made in the manner in which men of ordinary care and prudence usually transact their own affairs,—these and similar acts are badges of fraud. They are not fraud, but may be considered, when they exist, by the jury, as facts and circumstances which may tend to show fraud. A person greatly indebted and in failing circumstances may sell and give a good title to his property. It would be a great misfortune if such persons could not, as that is often the only means they have of paying honest debts. The law forbids such sales only as are made for the purpose of and with the intent of either hindering, delaying or defrauding creditors.[8]

(1344) The court instructs the jury that if they believe from the evidence, that a written bill of sale was given on the transfer of personal property (a conveyance of which is attacked by the plaintiff as fraudulent as to him) then the jury may take into consideration the giving of such written bill of sale, upon the question of whether the conveyance was fraudulent or not, although the items of property were numerous and valuable.[9]

(1345) The court instructs the jury that though they believe from the evidence, that a written bill of sale was given on the transfer of the personal property (attacked by the plaintiff as fraudulent) yet such fact does not necessarily indicate that the transfer was fraudulent.[10]

Secrecy.

(1346) The court instructs that if the sale was secret and no means were taken to apprise the public of it, such secrecy is a fact which throws suspicion upon the transaction, but does not conclusively prove fraud.[11]

Form of transfer.

(1347) The court instructs that for a debtor to convey

[8] Moon v. Helfer, 25 Kan. 140.
[9] Mattingly v. Wulke, 2 Ill. App. 169.
[10] Mattingly v. Wulke, 2 Ill. App. 169.
[11] Warner v. Norton, 61 U. S. (20 How.) 448, 15 L. Ed. 950.

his property in a mode so unusual as to exicte suspicion is a badge of fraud.[12]

Transactions not in usual course of business.

(1348) The court instructs that where a transfer of property is made outside of the usual course of one's business, by one who is insolvent and who is known to be so by the parties to whom he transfers and with whom he has confidential business relations, it will be considered as prima facie evidence against the parties to the transfer that a fraud was intended, and the facts and circumstances surrounding such transfer impose upon the party to whom the transfer is made the active duty of inquiring into the debtor's financial situation and the number of his creditors.[13]

(1349) The court instructs that the fact that an insolvent debtor disposes of or conveys his property in an unusual way, differing from the manner in which such disposition or conveyance is usually made, is a badge of fraud.[14]

(1350) The court instructs that in order to render a conveyance prima facie fraudulent, as not in the usual course of business, it must appear that the transaction was not according to the usual course of business of the particular person whose conveyance is attacked. It is not sufficient to show that such transactions are unusual in the general conduct of business throughout the community.[15]

(1351) The court instructs that though the sale of property by a debtor not made in the ordinary and usual course of business is prima facie fraudulent as against creditors, the question of fraud is one of fact for the jury.[16]

(1352) The court instructs that the law presumes that

[12] Hoffer v. Gladden, 75 Ga. 532.

[13] Judson v. Courier Co. (C. C.) 15 Fed. 541.

[14] Hoffer v. Gladden, 75 Ga. 532. It is not necessary for the court to say what is usual and what would excite suspicion.

[15] Bliss v. Crosier, 159 Mass. 498, 34 N. E. 1075.

[16] State ex rel. Peirce v. Merritt, 70 Mo. 275.

every man intends the necessary consequences of his acts, and where the conduct of the debtor necessarily results in defrauding his creditors, he is presumed to have foreseen and intended such result.[17]

Financial condition of grantor.

(1353) The court instructs that whether a conveyance like the one at issue is fraudulent or not, is a question of fact to be determined upon under all the circumstances under which it was made, and especially the condition of the grantor's property and the amount of his debts at the time of the conveyance; that the conveyance cannot be properly adjudged to have been made in fraud of creditors if the grantor was possessed of a large property and substantially free from debt, whose sole motive was to withdraw the estate conveyed from the hazard of business enterprise for the benefit of his family.[18]

(1354) The court instructs that a voluntary transfer of property by a person deeply indebted, whose property is not sufficient or barely sufficient to pay his debts, affords strong presumptive evidence of fraud.[19]

(1355) The court instructs the jury that an intent actually to defraud creditors is to be legally inferred from the grantor's being insolvent at the time, or greatly embarrassed; and if, therefore, the jury believe, from all the evidence in this case, that W. was insolvent at the time of the sale by him to the plaintiff, they would be justified in finding that the intent of W., in making that sale, was to hinder and delay his creditors.[20]

Indebtedness of grantor.

(1356) The court instructs that the mere fact that the grantor was indebted at the time of the conveyance, does not

[17] Williams v. White, 53 Pa. 890.

[18] Winchester v. Charter, 102 Mass. 272.

[19] Winchester v. Charter, 102 Mass. 272.

[20] Approved in Nelson v. Smith, 28 Ill. 495.

render the conveyance fraudulent in law as against existing creditors.[21]

(1357) The court instructs that the fact that one is indebted will not prevent him from selling his property to any one he pleases for an honest and fair consideration, though the effect of the sale will be to prevent creditors from reaching the property.[22]

Change of possession.

(1358) The court instructs the jury that the law presumes the transfer of the property unaccompanied by delivery and continued change of possession, to be fraudulent and void as against the creditors and subsequent purchasers in good faith of the vendor, that is to say, the law under such circumstances presumes that the transfer was without sufficient consideration, and also that there was intent to defraud purchasers or creditors.[23]

(1359) The court instructs that a sale by a debtor is void as to creditors unless accompanied by immediate, open, visible and continued change of possession, and that it is for the jury to determine under all the evidence whether there was such immediate delivery and such actual change of possession as was necessary to a valid transfer.[24]

(1360) The court instructs that where there is a sale of personal property by a debtor, there must be a delivery and change of possession before the purchaser can acquire title as against the creditor of the seller, though the sale may be made in good faith and for an adequate consideration. The delivery may be actual or constructive, but it must be substantial and not a mere formal and temporary change of possession.[25]

[21] Koster v. Hiller, 4 Ill. App. (4 Bradw.) 21.
[22] Hessing v. McCloskey, 37 Ill. 341.
[23] Thompson v. Blanchard, 4 N. Y. 303.
[24] Shauer v. Alterton, 151 U. S. 607, 14 Sup. Ct. 442, 38 L. Ed. 286.
[25] Pickard v. Hopkins, 17 Ill. App. 570.

(1361) The court instructs that a party may be in possession of property by his agent as well as by himself, and if the goods were sold for a valuable consideration, and the possession delivered to the purchaser, it is not necessary that he should remain in the actual possession of the property sold, to guard his title; but such possession may be by an agent or agents, and such agent may be the seller of the property, if such possession is such as to advise creditors of the change in the title of the property.[26]

(1362) The court instructs that a sale by a debtor will be deemed fraudulent as to creditors unless it is accompanied by an actual and continued change of possession, and if the vendor of a stock of goods is allowed to continue in possession and sell as the agent of the purchaser, and if the jury find that the vendor was left in charge of the goods as a mere figure head, and there was not an honest and open transfer, there is not the actual and continued change of possession which the law requires.[27]

(1363) The court instructs the jury that possession of certain kinds of personal property cannot be changed by manual delivery, and in such case the question arises whether the grantee in the conveyance has taken such possession of the property as he could. Everything in the power of the party should be done to indicate the change in the possession. The question for the jury is: "Was there such a delivery and change of possession as the nature of the property was capable of?" If the grantee took such possession as the nature of the property was capable of, he must be held entitled to it.[28]

(1364) The court instructs that although a delivery of property sold is necessary to pass the title thereto, yet such delivery need not be an actual and manual one, but anything

[26] Warner v. Carlton, 22 Ill. 415.

[27] Hopkins v. Bishop, 91 Mich. 328, 51 N. W. 902.

[28] Chase v. Ralston, 30 Pa. 539.

which clearly shows a surrender of ownership by the seller and assumption of ownership by the purchaser, accompanied by such circumstances as would ordinarily advise the world of such change of ownership, is all that is necessary.[29]

Consideration.

(1365) The court instructs that if the price paid was grossly inadequate, such fact should be considered in determining whether the transaction was fraudulent, its weight being affected by the other circumstances of the transaction.[30]

(1366) The court instructs that the jury should consider the fact that the mortgage attacked covered a large amount of property, and if the jury find that the property covered is largely in excess of the debts secured, they should consider this as a circumstance with other facts proven as bearing upon the bona fides of the parties.[31]

Transactions based on consideration.

(1367) The court instructs that a transfer of property with an intent to defraud creditors will be void although there may be an adequate consideration. Proof of consideration does not decisively preclude a presumption of fraud as the intention of the parties is the test by which the transaction is to be judged.[32]

Conveyance to satisfy debt.

(1368) The court instructs the jury that, if they believe from the evidence that K. conveyed said goods to the claimants before the levy, and that the claimants openly received said goods, and the same were taken solely for the purpose of securing their debt and not for the purpose of covering up said goods or their proceeds for the benefit of K. to the

[29] Warner v. Carlton, 22 Ill. 415.
[30] Bickler v. Kendall, 66 Iowa, 703, 23 N. W. 518.
[31] Ganong v. Green, 71 Mich. 1, 38 N. W. 661.
[32] Alexander v. Todd, Fed. Cas. No. 175 (1 Bond, 175).

prejudice of the other creditors, and no more goods were received than were reasonably sufficient to discharge their debt, then they shall find for the claimants.[33]

(1369) The court instructs that a conveyance of property made by the debtor with the intent of hindering or delaying some of his creditors, is fraudulent so far as the debtor is concerned, though the debtor by reason of such conveyance liquidates a just debt.[34]

(1370) The court instructs that though the jury believe from the evidence that the mortgage attacked as in fraud of creditors was given to secure a debt, yet if it was also given to hinder and delay creditors, and the intent with which the mortgage was given was known at the time of the execution of the mortgage to the mortgagee, and if the jury believe further from the evidence that the mortgagee participated in the fraudulent intent of the mortgagor, the mortgage would be fraudulent as to creditors.[35]

Same—Absence of evidence of debt.

(1371) The court instructs that the jury may consider upon the question of the genuineness of the debt, along with all other circumstances, the fact that no notes were given to the alleged creditor, nor any charges made by him and that there were no other contemporaneous evidences of the debt alleged to have been secured by the conveyance.[36]

Dealings between relatives.

(1372) The court instructs that a man has a perfect right to deal with his friends and relatives, and the presumption of law is that dealings between relatives are fair and

[33] Brown & Co. v. Lessing, Solomon & Rosenthal, 70 Tex. 544.

[34] Strauss v. Abrahams (C. C.) 32 Fed. 310.

[35] Swofford Bros. Dry-Goods Co. v. Smith-McCord Dry-Goods Co. (Ind. Ter.) 37 S. W. 103.

[36] Hinchman v. Parlin & Orendorff Co. (C. C. A.) 81 F. 157.

honest without a wrongful or fraudulent intent, and no presumption of fraud attaches to such dealings.[37]

(1373) The court instructs that the mere fact of relationship between the parties to the conveyance attacked, is not a badge of fraud. Notwithstanding such relationship, the law presumes good faith and honest intention, and if the evidence is evenly balanced on the question of intent, the transfer must be upheld.[38]

(1374) The court instructs the jury that if you believe from the evidence that the conveyance was between (father and daughter) the transaction should be scanned with care and caution, if the jury further find from the evidence that other badges of fraud than the mere fact of the relationship appear.[39]

Conveyance by husband to wife.

(1375) The court instructs the jury that gross inadequacy of consideration, if it exists, is a badge of fraud and a circumstance which may be considered by the jury in determining whether the conveyance by A. to his wife, Mrs. A. (claimant) was fair and honest or pretended and fraudulent. Transactions between husband and wife should be scanned carefully when the rights of creditors are to be affected thereby. The law requires them to exercise good faith and you should be satisfied that they have done so before sustaining any transaction which would defeat a creditor in the collection of his debt. You should be satisfied of the actual existence of a just debt due from A. to Mrs. A., and that it was the consideration of the deeds to her; and that the consideration was not inadequate before you would be authorized to sustain the title against creditors. All dealings between husband and wife which are injurious to creditors should be scrutinized closely and their bona fides must be clearly estab-

[37] Schroeder v. Walsh, 120 Ill. 403.

[38] Shauer v. Alterton, 151 U. S. 607, 14 Sup. Ct. 442, 38 L. Ed. 286.

[39] Hicks v. Sharp, 89 Ga. 311, 15 S. E. 314; Sharp v. Hicks, Id.

lished, and in such case, the burden of proof is on them as to this.[40]

(1376) The court instructs the jury that the property involved in this suit and claimed by plaintiff was attached by defendant to satisfy a debt owing by plaintiff's husband to defendant; that it is claimed that before the attachment the plaintiff and her husband were in occupation of certain premises as a homestead; that the husband desired to sell the homestead of the parties upon which they resided; that plaintiff refused to sign the deed unless he would make over to her one-third of the money derived from the sale; that he did so, and that all of the said property was purchased with that money. Now, it is not very material that you should understand what the rights of a married woman in the homestead are for the purpose of considering the questions that will be submitted to you, but I will state in a general way what I understand her rights to be in the homestead. The husband cannot sell or dispose of it during the lives of both, so long as it remains a homestead, without her signature, in fact can pass no title whatever. If she survives him, and they have no issue, she inherits the property absolutely; it goes to her and her heirs, as I understand it. If there is issue, she retains the use of it during widowhood, if the widowhood continues during her life; if not, up to the time that she marries, this being her right in the homestead. She claims that she refused to sign the deed unless her husband would settle upon her one-third of the proceeds, and that was a reasonable settlement in view of her rights in the homestead. I charge you, as a matter of law, that a relinquishment by the plaintiff of her rights in the homestead to secure for herself the money received upon such consideration as a settlement postnuptial or after the marriage, is a valid consideration for the purpose of keeping

[40] Approved in Almond v. Gairdner & Arnold, 76 Ga. 699.

the property that may afterward be obtained with the money from the hands of creditors. This is her claim in regard to the property claimed by the plaintiff in this suit, and it is a question of fact for you to determine from all the facts and circumstances proved, whether the claim is well founded, and whether such a transaction occurred.[41]

Conveyance of exempt property.

(1377) The court instructs the jury that it is conceded that the books made the subject of this replevin suit were exempt as a library of the debtor C., and that C. had a right to sell such books to any one for a valuable consideration and when so sold they would not become liable to seizure and sale for debts; the court further instructs the jury that the debtor had a right to donate his books to his children in consideration of his love and affection for them and if that gift was followed by actual and manual delivery to them, the property continued to be exempt from sale on execution by his creditor, and if the jury believe from the evidence that the books in this case were exempt to the debtor prior to any transfer or pretended transfer he had a right to sell or donate them and it is perfectly immaterial whether he designed to defraud creditors or not. But if he changed the library into a stock in trade and placed these books with others for sale as stock in trade, and not for sale as a library, then they were no longer exempt as a library.[42]

(1378) The court instructs the jury that while it is the general rule that one who has exempt personal chattels may give them away or sell them in good faith without impairing the rights of creditors, yet, if one having exempt chattels, abandons or is about to abandon the use of them, on which the exemption rests, and for the purpose of keeping them out

[41] Allen v. Perry, 56 Wis. 178.

[42] Carhart v. Harshaw, 45 Wis. 340.

of reach of his creditors, makes a colorable gift or sale of them for his own use, the fraudulent intent will avoid the gift or sale as against creditors; so, too, if the fraud against creditors involved also a fraud on the exemption law, as where one having a team exempt by law, makes a colorable gift or sale of it for his own use for the purpose of acquiring another team for his exemption, and of holding both teams for his own use, the one by way of exemption and the other under a fraudulent gift or sale.[43]

Knowledge of grantee, or fraudulent participation by him in fraud.

(1379) The court instructs that if the jury believe from the evidence that the grantor executed the conveyance with intention to defraud creditors, and the grantee had knowledge of the fraud and participated therein, the conveyance may be set aside as in fraud of creditors.[44]

(1380) The court instructs that though the jury should believe from the evidence that the object and purpose of (A., the debtor) in making the sale was to hinder, delay or defraud his creditors, yet unless the jury are satisfied from the proof that the plaintiff (or defendant) knew that fact and bought the goods with such knowledge, the jury cannot find the sale fraudulent because of the intent of the debtor.[45]

(1381) The court instructs that a conveyance or sale of property made with intent on the part of the vendor known to the grantee and participated in by him to delay, defeat, hinder or defraud a particular creditor and prevent him from obtaining his debt, though such conveyance is made for a valuable consideration, is fraudulent as against such creditor.[46]

(1382) The court instructs the jury that, if the sale was

[43] Per Ryan, C. J., in Carhart v. Harshaw, 45 Wis. 340.
[44] Frost v. Mason, 44 S. W. 53.
[45] Warner v. Carlton, 22 Ill. 415.
[46] Nelson v. Smith, 28 Ill. 495.

made by C. to the plaintiff G. with intent to hinder, delay or defraud his creditors, and that G. at the time of the purchase knew of such intent on the part of C., to hinder, delay or defraud his creditors, or if he knew such facts or circumstances as would have put a man of ordinary prudence upon inquiry, and which by the use of ordinary diligence on his part would have led to a knowledge on his part, that such was the intention of C. in selling the goods to him, then such sale as between plaintiff and defendant is fraudulent and void.[47]

(1383) The court instructs the jury that although you should find that C. made one or both sales to plaintiff, with intent to hinder, delay and defraud his creditors, yet if he paid a valuable consideration for the goods, such intent on the part of C. would not alone make the sale void. In order to invalidate the sale it must further appear from the evidence that the plaintiff, at the time he bought and paid for the goods, had notice of such intent on the part of C. or that he had knowledge of facts or circumstances such as would have put an ordinarily prudent man upon inquiry, which by the use of proper diligence on his part would have led to a knowledge of such intention on the part of C.[48]

(1384) The court instructs that if a debtor makes a sale of property with a view of hindering or delaying creditors, and the indebtedness of the seller together with his intent is known to the purchaser, the transaction is one which the law will not uphold and is void.[49]

(1385) The court instructs the jury to find for the (grantee) unless the debtor made the sale to the grantee with intent to hinder, delay or defraud his creditors and the grantee knew of such indebtedness and intention, or might have known of them by the use of ordinary diligence, which

[47] Approved in Dodd v. Gaines, 82 Tex. 429.
[48] Approved in Dodd v. Gaines, 82 Tex. 429
[49] Evans v. Rugee, 57 Wis. 623, 16 N. W. 49.

diligence is such diligence as an ordinarily prudent man would use or be expected to use in the conduct of his business affairs.[50]

(1386) The court instructs that if the buyer of goods from a debtor pays a fair price, the jury must find in his favor unless the seller made the sale to hinder or defraud creditors, and the buyer had notice or information sufficient to charge him with notice of the intent of the seller.[51]

II. Operation and Effect.

In general.

(1387) The court instructs the jury that under the laws of ———, every gift, grant, conveyance, assignment or transfer of or charge upon any estate, real or personal, or right or thing in action, or any rent or profit thereof, made with the intent to disturb, delay, hinder or defraud creditors or other persons, and every bond or other evidence of debt given, suit commenced, decree or judgment suffered with the like intent, shall be void as against creditors or other persons.[52]

Inability to recover on notes given as consideration of fraudulent conveyance.

(1388) The court instructs the jury that if they believe from the evidence that the conveyances to the defendant in evidence were made for the purpose of hindering, delaying or defrauding the creditors of the said plaintiff or any of them, and that the notes sued on herein were executed and delivered by defendant to plaintiff in pursuance of such unlawful agreement, and upon no other consideration, then you are instructed that such unlawful purpose precludes any recovery by the plaintiff against the defendant upon any

[50] Ratto v. Bluestine, 84 Tex. 57, 19 S. W. 338.

[51] Skipper v. Reeves, 93 Ala. 332, 8 South. 804.

[52] Approved in Riedle v. Mulhausen, 20 Ill. App. 68.

notes so given upon such unlawful and fraudulent consideration, and your verdict should be for the defendant.[53]

(1389) The court instructs the jury that if the jury believe from the evidence adduced that the conveyance from the plaintiff to the defendant was for the purpose of hindering, delaying or defeating the creditors of the plaintiff in any attempt they might make to enforce their claims against the plaintiff, and that was the understanding and agreement between the plaintiff and defendant, and that the notes in suit were given in pursuance of this agreement between plaintiff and defendant, then the jury are instructed as a matter of law that the said agreement between the plaintiff and the defendant was illegal and cannot be enforced and the jury must find for the defendant.[54]

Rights of purchaser from fraudulent grantee.

(1390) The court instructs the jury that if the jury believe, from the evidence, that the contract between S. and B. was of the fraudulent character mentioned in the above instruction, then the pretended sale between S. and B. would be void as against S.'s creditors, and such creditors could attach and hold said property in the hands of B. for the satisfaction of their demands; and in like manner said creditors could attach and hold said property in the hands of the plaintiffs, if the plaintiffs only purchased said property of B., and before and at the time of their purchase had full knowledge of the void character of said B.'s title on account of such fraud.[55]

(1391) The court instructs the jury that if they believe from the evidence, that the sale of the property, the title to which is in controversy, in this suit made by A. to B., was made for the purpose of hindering, delaying or defrauding

[53] Approved in Riedle v. Mulhausen, 20 Ill. App. 68.
[54] Approved in Riedle v. Mulhausen, 20 Ill. App. 68.
[55] Approved in Waggoner v. Cooley, 17 Ill. 239.

the creditors of said A. in the collection of their demands against A., and that B. participated in the said fraudulent intent of A. in making his, said B.'s, purchase of the said property; and if the plaintiffs only have shown a title to said property acquired through B., and if the jury believe, from the evidence, that said plaintiffs purchased from B. with a full knowledge of the said fraudulent contract between A. and B., then the plaintiffs have shown no better title to said property as against the rights of A.'s other creditors than B. had thereto at the time when he sold the same to the plaintiffs.[56]

(1392) The court instructs the jury that if the property is conveyed for the purpose of hindering, delaying or defrauding the creditors of the seller, and such property is attached by such creditors, such property is considered as still the property of the seller in favor of his creditors' rights.[57]

III. Presumptions and Sufficiency of Evidence.

Burden of proof as to fraud.

(1393) The court instructs the jury that, if you find there was a sale by ——— to plaintiff of the property in controversy then you will inquire into and determine the character of this sale; that is, determine from the evidence whether or not it was fraudulent. It is alleged by defendants that it was and is fraudulent and you are instructed that the burden of proving the same rests upon the defendants and they must do so by a fair preponderance of the evidence; and you are instructed that the law presumes that all persons transact their business honestly and in good faith, until the contrary appears from a preponderance of the evidence; and in this case if you find there was a sale as claimed, it will be presumed that plaintiff and the ———

[56] Approved in Waggoner v. Cooley, 17 Ill. 239.

[57] Approved in Waggoner v. Cooley, 17 Ill. 239.

acted honestly and in good faith in making the same, until such time as the defendants, who allege the contrary, establish the same by a fair preponderance of the evidence; and if the case is left in equipoise then the defendants must fail as to the fraud; and fraud will never be imputed when the facts upon which the charge is predicated, are or may be consistent with honesty and purity of intention.[58]

Burden of proof as to notice to grantee.

(1394) The court instructs the jury that the plaintiff seeks to recover the proceeds of the policy issued by the ——— Insurance Company to the defendant for the purpose of applying such proceeds upon the debt owing by defendant to the plaintiff. It is shown without any conflicting evidence that the policy whose proceeds plaintiff seeks to recover was transferred before the bringing of this suit to C., for a valuable consideration. The court instructs the jury that the burden of proof is upon the plaintiff to show by a preponderance of the evidence that the transfer of said policy was made with intent on the part of defendant to hinder, delay and defraud creditors, and further that said C. had notice of such intent and that he had notice of such facts as would have excited in the mind of a person of ordinary prudence a suspicion of such intention.[59]

Presumption as to fraud.

(1395) The court instructs that fraud is never to be presumed, but must be affirmatively proved by the party alleging the same. The law presumes that the dealings of men are without intention to disturb, cheat, hinder, delay or defraud creditors, and if any transaction called in question is equally capable of two constructions, one that it is fair and honest and the other that it is dishonest, the presumption will be that the transaction is honest and fair.[60]

[58] Approved in Sunberg v. Babcock, 66 Iowa, 515.
[59] Martin Brown Co. v. Cooper, 82 Tex. 242.
[60] Schroeder v. Walsh, 120 Ill. 403.

Sufficiency of evidence.

(1396) The court instructs that in order to find for (the party attacking the conveyance as fraudulent) the jury must find the existence of fraud from the evidence as they would any other fact, and will not be permitted to guess, suspect or presume fraud.[61]

(1397) The court instructs that evidence which merely creates a doubt of the fairness of the transaction is not sufficient to overturn a sale and deprive parties of title to property which they seem to have acquired in the usual course of business.[62]

(1398) The court instructs that fraud in the purchase by a creditor of the goods of an insolvent debtor, must be proved either directly and affirmatively by the party alleging it, or by such facts and circumstances as are sufficient to establish it to the satisfaction of the jury. It is not to be presumed.[63]

(1399) The court instructs the jury that a party alleging fraud must prove it by satisfactory evidence. Fraud will never be imputed when the facts upon which a charge is predicated, are, or may be, consistent with honesty and purity of intention.[64]

Same—Action by alleged fraudulent grantee against levying sheriff.

(1400) The court instructs the jury that the defendant sheriff has alleged fraud in the making of the oral lease between plaintiff and H., and if, in your opinion, he has failed to clearly establish the same, you must find for plaintiff. The burden of proving the truth of the allegations of fraud rests on the defendant, and the contract of lease between the plaintiff and H. is presumed to be a fair and honest contract.

[61] Schroeder v. Walsh, 120 Ill. 403.
[62] Waterman v. Donalson, 43 Ill. 29.
[63] Hanchett v. Goetz, 25 Ill. App. 445.
[64] Approved in Prichard v. Hopkins, 52 Iowa, 120.

Fraud is never to be presumed, but must be clearly proved to the satisfaction of the jury.[65]

(1401) The court instructs the jury that fraud is never to be presumed. The allegations of fraud in defendant's answer must be by him affirmatively established by the evidence, and will not be presumed from acts of the parties which may be accounted for on the basis of honesty and good faith. The defendant must establish the existence of fraud by a preponderance of the testimony before you can find for the defendant, for unless you are satisfied from the evidence that the defendant has clearly proved the existence of fraud in the lease from H. to plaintiff, then you must find for the plaintiff.[66]

CHAPTER LXXI.

GAMBLING CONTRACTS.

Recovery by broker for services in conducting gambling transaction, 1402.
Action between partners engaged in bookmaking, 1403.
Action to recover from stakeholder money placed in his hands as wager upon result of an election, 1404.

Recovery by broker for services in conducting gambling transaction.

(1402) The court instructs the jury that if they shall find from the evidence that when the defendant gave to the plaintiffs the several orders offered in evidence for the purchase and sale of stocks, it was mutually understood between them that the defendant was not to deliver any of the stocks that he ordered to be sold, or to accept any of the stocks that he ordered to be bought, but that all of said transactions in

[65] Prichard v. Hopkins, 52 Iowa, 120.

H. was debtor. Defendant as sheriff levied the execution. Plaintiff was the supposed fraudulent grantee.

[66] Approved in Prichard v. Hopkins, 52 Iowa, 120.

stocks were to be settled and adjusted by the payment or receipt as the case might be, of differences between the price at which said stock should be bought and at which they should be sold, and if the jury shall further find that in pursuance of said mutual understanding, the plaintiffs in their own names, transmitted to their correspondents for execution, said orders of the defendant and that said orders were executed by the said correspondents of the plaintiffs upon the credit of the plaintiffs and upon security furnished by them, then the plaintiffs are not entitled to recover in this action for services rendered or advances made by them in furthering and conducting said transactions for the defendant.[1]

Action between partners engaged in bookmaking.

(1403) The court instructs the jury, as a matter of law, that if they believe from the evidence that the plaintiff and the defendant were copartners in the business of making books on horse races, and that the money given the defendant by the plaintiff, and which is the subject of this suit, was in furtherance of said partnership business of book making on horse races, then the jury will find for the defendant.[2]

Action to recover from stakeholder money placed in his hands as wager upon result of an election.

(1404) The court instructs the jury that a wager upon the result of an election is an illegal contract and that an action upon such a contract cannot be maintained by the winning party against a party losing the bet, but that if the money has been paid over to the winning party by the consent of the losing party, the loser cannot maintain an action against the former to recover back money so paid over, and that if the money was, as in the present case deposited with the stakeholder, either party may forbid his paying over money wagered to the other party and after proper proofs they may

[1] Approved in Stewart v. Schall, 65 Md. 289.

[2] Approved in Shaffner v. Pinchback, 133 Ill. 410.

maintain an action against the stakeholder to recover money so deposited with the stakeholder, and the action may be maintained against the stakeholder, even after he has paid the money to the winner, if he has paid it over after his authority to do so has been revoked or after he has been directed by the loser not to pay it over. In this case there is no dispute as to the amount of money deposited with the defendant nor as to the person with whom, or the terms upon which the deposit was made, and the only question of fact for the jury to pass upon is as to whether the defendant paid over to the party winning the bet, with or without the consent or permission of the plaintiff, the sum deposited with the defendant. The fact, if it is a fact, that the parties agreed to submit the question of the right of the winner of the bet to the money deposited with the defendant to arbitration, did not legalize the wager, but the jury may consider this fact, if it be a fact, in connection with the other evidence in the case, as bearing upon the question whether the money was paid over by the defendant to the said ——— with the consent or permission of the plaintiff and if upon all the evidence, the jury shall find that the money was paid with the consent or permission of the plaintiff, they shall return a verdict for the defendant, but if they shall upon the evidence find that the money was paid over without the consent or permission of the plaintiff and after the plaintiff had directed the defendant not to pay over, they shall return a verdict for the plaintiff.[3]

[3] Fisher v. Hildreth, 117 Mass. 558.

CHAPTER LXXII.

GAS.

Presumptions and burden of proof based on dangerous nature of element, 1405.
Damages caused by seepage of gas, 1406.
Liability for explosion, 1407-1411.

Presumptions and burden of proof based on dangerous nature of element, 1405.

(1405) The court instructs the jury that if you find from the evidence that defendant brought into the street an inflammable and explosive fluid, capable of escaping in such a way as to produce the casualty complained of, and that such casualty actually occurred, then the facts thus found may be treated as sufficient to justify the inference that the casualty was due to the agency or negligence of the defendant, in the absence of proof that it was otherwise caused.[1]

Damages caused by seepage of gas.

(1406) The court instructs the jury that, as you will doubtless thoroughly understand from the evidence which has been given, and the arguments of counsel, and from the instructions which I have already given you, the question in the case is whether this accident was due to the negligence of the employes of the defendant gas company, and whether through that negligence the gas found its way into the manhole and was in some manner ignited and caused the explosion and caused the flame to come out and set the boy's clothing on fire.[2]

Liability for explosion.

(1407) The court instructs the jury that there are conditions upon which persons suffering injury to their property may recover damages of the gas company. Those conditions are, that the plaintiff who seeks to recover the damages shall show affirmatively, the burden of proof being upon him, that

[1] Approved in Tiehr v. Consolidated Gas Co., 51 App. Div. 446.
[2] Approved in Tiehr v Consolidated Gas Co., 51 App. Div. 44[illegible]

the injury was occasioned by the negligence of the servants of the defendant company; and that in no material degree did the negligence of the tenant of the plaintiff contribute to that injury; and if those facts are established upon the whole evidence, by a fair preponderance of the evidence, the plaintiff has a right to recover; if not, he has not.

—**Recovery by landlord against third person.**

(1408) The court instructs the jury that the question is, Was either of these parties negligent, or not? If either, which? For, if it was a pure accident, and nobody negligent, then the loss must fall where Providence sent it. This is not a case where the plaintiff can recover, if he has been recklessly negligent himself, or if the tenant of plaintiff was guilty of negligence contributing to the injury. It is entirely settled that, if the tenant was recklessly negligent, the landlord cannot recover, if that negligence contributed in a material degree to the explosion and injury.

(1409) The court instructs the jury that the case stands, under the general principle which I have stated, in this way: that the plaintiff in this case must offer to show, and must satisfy you, upon the whole evidence, by a fair preponderance of the evidence, that he was in the exercise of due care, of such care as a prudent man might reasonably be expected to exercise under the circumstances, and that the explosion was caused by the negligence of the defendant.

(1410) The court instructs the jury that if the defendant's servants, the officers of the company, did not know, and by the use of due care could not ascertain, that the gas was escaping into plaintiff's house, or had reasonable cause to believe that it was not, and no notice was given by the inmates of the house to them that gas was in the house, the defendant is not liable. But if the defendant's servants did know, or if, with their knowledge of the condition of the street they had reasonable cause to suspect, that the gas had entered into or under the plaintiff's house in dangerous quantities,

or was then entering into the plaintiff's house in such quantities, and gave no notice to the inmates, and made no request to be admitted into the house for the purpose of examining, the company is liable in damages, if the plaintiff's tenant was in the exercise of due care.

(1411) The court instructs the jury that if they are satisfied that the tenant,———, having discovered the presence of gas in an unusually large quantity in the house, or in a room of the house, did not take reasonable means and precautions to remove and exclude the gas, or, not knowing what such precautions were, did not notify the servants of the defendant that gas was escaping, or make some reasonable effort to notify them that gas was escaping into the house, and if he recklessly brought the flame of the candle into contact with the gas and air of the room, his want of care will prevent recovery on the part of the plaintiff in this case, although the jury may believe that the defendant was negligent.[s]

CHAPTER LXXIII.

GIFTS.

In general, 1412.
Language to support parol gift, 1413.
Retraction of gift by donor, 1414.
What constitutes gift causa mortis, 1415.

In general.

(1412) The court instructs the jury that if the defendant intended the note to be a gift to the plaintiff, it was given without any legal consideration therefor, although the plaintiff may have supposed the note to be in payment for a prior indebtedness, unless the defendant by his words or conduct gave the plaintiff reasonable cause to believe, and the plaintiff was thereby led to believe, that the note was given in settle-

[s] Approved in Bartlett v. Boston Gaslight Co., 122 Mass. 209.

ment of her claim against the estate of the wife for services, or of some claim in controversy between the plaintiff and the defendant.[1]

Language to support parol gift.

(1413) The court instructs the jury that as no consideration passes from the donee to the donor, the law requires every parol gift to be a sedate, deliberate act, and therefore incautious expressions, or expressions used in a state of inebriety, would not be sufficient.[2]

Retraction of gift by donor.

(1414) The court instructs the jury that if they find from all the evidence in the case that ———, grandfather of the plaintiff, was the owner of the horse in contest when a colt, and gave or sold the same to the plaintiff, and placed the same in possession of the plaintiff, and if ——— afterwards sold or transferred said horse to another without the consent of the plaintiff, then they will find for the plaintiff said horse, if to be had; if not to be had, then his value at the time, with reasonable value for the use of said horse from the bringing of this suit till the present time, which value and use will be fixed by the jury.[3]

What constitutes gift causa mortis.

(1415) The court instructs the jury that if A. (the donor) when sick and not expecting to get well gave the money in dispute in this case to her husband and afterward recovered from such sickness and repossessed herself of said money then such gift would be void.[4]

[1] Approved in Nye v. Chace, 139 Mass. 379.

[2] Approved in Morisey v. Bunting, 12 N. C. 3.

[3] Approved in Dixon v. Labry, 16 Ky. Law Rep. 522.

[4] Marsh v. Prentiss, 48 Ill. App. 74. The court above held that it was not necessary to add to this instruction a statement informing the jury that such a gift as described was in law known as "donatio causa mortis."

CHAPTER LXXIV.

HIGHWAYS.

I. Public Highways.
Establishment of highway, 1416-1420.
Same—Prescription or user, 1421-1427.
Duty to safeguard defects in highway, 1428.
Law of the road—Injuries caused by careless driving, 1429, 1430, 1431.
Injuries caused by runaway horse, 1432, 1433.
Injuries to bicycle riders, 1434-1438.
Liability of private person for injuries caused by excavation in highway, 1439.
Criminal prosecution for destruction of bridge part of highway, 1440-1445.

II. Turnpikes.
Liability for injuries caused by defects in roadway, 1446-1448.
Burden of proof, 1449.

I. Public Highways.

Establishment of highway.

(1416) The court instructs the jury that to constitute a dedication of private property as a street, the owner thereof must have intentionally dedicated the same by voluntary act, or that the public has used as a common highway the property for such a length of time as that the law presumes acquiescence in such use by the owner of the property.[1]

(1417) The court instructs the jury that if they believe from the evidence, that the plaintiff, about the year 19—, fenced out a strip of his land, intending that it should be taken by the public for a highway, of which strip the place in question is a part; that the public accepted said strip of land by working and improving the same under the direction of the public highway officers, and by using the same as a public highway, and that plaintiff, well knowing such improvement and use, acquiesced therein for about eighteen

[1] Buntin v. City of Danville, 93 Va. 200.

years without objection, then the place in question has been dedicated to the public and the jury must find the defendant not guilty. If, however, there was a laid out road sixty feet wide, with the section line as the centre line of the road, and if the road was fenced by the plaintiff with intent to fence on the north line of said laid out road, and if by mistake the fence was placed between twenty and thirty feet too far north, then the dedication would be of the north thirty feet in width of the road along the section line of plaintiff's land,—if he only intended to dedicate the north half of the road as laid out on the south thirty feet only of his land north of the section line.[2]

(1418) Although the jury may believe from the evidence that after the fence on the land in the petition mentioned was moved in so as to leave a strip of thirty feet between said fence and the line of the right of way of the railway company, the said strip was with the knowledge of ——— and her children used by all persons desiring to pass over the same in going to and from ———, and although the jury may further find that ——— and her children passed over said strip in going to and from ———, such use of said strip does not operate in law as a dedication of said strip to the public use as a public highway.[3]

(1419) The court instructs the jury that if they shall believe from the evidence that any owner of the fee of the land in question at any time before the same passed to ———, dedicated or appropriated the land in question for a street, and the same was accepted as a street by the corporate authorities of ———, then such dedication was irrevocable, and the jury should find for the defendant. And the court further instructs the jury that such dedication of the land

[2] Approved in Manrose v. Parker, 90 Ill. 581. These instructions were given in a suit by one claiming title to the land covered by the alleged highway against a commissioner of the highway who tore down a fence erected by the plaintiff.

[3] Approved in McBeth v. Trabue, 69 Mo. 642.

may be inferred from any acts of the owner or circumstances evidencing an intent on the part of the owner so to dedicate, accompanied by the use of the land by the public as a highway for a long space of time, and the acceptance by the corporation may be inferred from the exercise by the corporate authorities of acts of control and management such as repairing, grading or otherwise treating the land as a public street.[4]

(1420) The court instructs the jury that highways may be acquired by dedication. And in this case, if the jury believe from the evidence, that, after the highway in controversy was located, defendants set their hedges back, leaving room for the highway and removed their fence from said highway, and permitted the public to use the same for a highway,—these facts, if proven, may be considered by the jury in determining whether the defendants had dedicated this land to the public for a highway.[5]

Same—Prescription or user.

(1421) The court instructs the jury that in considering the evidence in this case with reference to the issue joined upon the defendant's third plea of common and public highway, the jury are instructed that long use never ripens into such a right of way or easement unless it be an adverse and uninterrupted enjoyment of such use under a claim of right for the full period of 20 years; and the jury are further instructed that if the user is by permission, leave, license, or indulgence of the party over whose land such use is enjoyed, or can in view of all the evidence, be placed upon any other footing than a claim or assertion of the right, it will repel any presumption of a grant and will be what is called a precarious use, and such precarious use never ripens into an adverse use, no matter how long it continues.[6]

[4] Buntin v. City of Danville, 93 Va. 200.

[5] Approved in Wragg v. Penn Township, 94 Ill. 11.

[6] Approved in District of Columbia v. Robinson, 14 App. D. C. 512.

(1422) The court instructs the jury that if they believe from the evidence that the public used ——— road as a public highway whenever it saw fit, without leave of the owner and without objection from him, this is adverse, and uninterrupted adverse enjoyment for 20 years constitutes a title which cannot afterwards be disputed. Such enjoyment, without evidence to explain how it began, is presumed to be in pursuance of a full and unqualified grant.[7]

(1423) The court instructs the jury that if they believe from the evidence, that a public road had been used by the public over the place of obstruction in question, for twenty years without interruptions, and that the owners of the land acquiesced therein, the law presumes a dedication of the ground upon which the road runs to the use of the public, for such purpose.[8]

(1424) The court instructs the jury that if they believe, from the evidence, that a public road was laid out over the place of obstruction in question, that it was used and traveled by the public as such, and that it was recognized and kept in repair as such by the public authorities, then proof of these facts furnishes a legal presumption, liable to be rebutted, that such road is a public highway.[9]

(1425) The court instructs the jury that the acquiescence by the owner in the use of his land by the public for twenty years as a street or highway will in itself afford sufficient evidence of an intention to dedicate the land as a street or highway.[10]

(1426) The court instructs the jury that the exercise of ownership or control over the property claimed to have been dedicated by acquiescence in its use and occupation, such as the occupancy of, or the interposition of obstacles and bar-

[7] Approved in District of Columbia v. Robinson, 14 App. D. C. 512.
[8] Approved in Daniels v. People, 21 Ill. 439.
[9] Approved in Daniels v. People, 21 Ill. 439.
[10] Buntin v. City of Danville, 93 Va. 200.

riers by the original owners of the property to the general and public user of the same, precludes and refutes the idea of dedication and acquiescence by the owner in the use of the public; and the law will not in such cases presume a dedication of the property.[11]

(1427) The court instructs the jury that when at the time of the purchase of real estate, there is a road or right of way used by the public, such as a public highway, or a road used so long that there may be a presumption of a dedication to the public, the purchaser takes the land subject to such right.[12]

Duty to safeguard defects in highway.

(1428) The court instructs the jury that the way in question was a highway which the defendant was bound to keep in repair, and was liable to the plaintiff if he was injured by a defect in it while he was traveling over it and using due care. The defendant had a right to repair the road and to put the mound of earth where it was for that purpose, but would be bound to fence or guard it in some manner so as to prevent travelers from injury by means of it. The defendant could protect travelers from injury and the town from liability in either of two ways: First, by placing and keeping a sufficient guard or barrier at the place where the mound was, so as to keep travelers away from it; second, by placing and keeping a suitable and sufficient fence or barrier across the highway at the end of the part that was being constructed, so as to notify travelers that the way was not for use and to prevent the using of it. If the defendant placed a proper and sufficient fence or barrier across the way at the east end, the direction the plaintiff came, sufficient and suitable to notify a person of ordinary prudence that the way was not for use, and such fence or barrier was there in place at the close of the day of the accident the defendant would not be liable.

[11] Buntin v. City of Danville, 93 Va. 200.
[12] Buntin v. City of Danville, 93 Va. 200.

It is for the jury to say whether the fence which was placed across the way at the east end was suitable and sufficient. If the town attempted to close the whole road by barriers, and knew or had reason to know that those barriers had been constantly and repeatedly taken down or left down, that knowledge is to be considered by the jury in determining whether the defendant's precautions were such as were reasonable.[13]

Law of the road—Injuries caused by careless driving.

(1429) The court instructs the jury that if they believe from all the evidence in the case that the defendant was driving his horse in a run, and racing with a bicycle at a dangerous and unnecessary speed, upon one of the streets of the city of ———, that would constitute negligence; and, if the jury further believe that the injuries complained of were received by plaintiff as the direct result of such negligence on the part of the defendant, the plaintiff is entitled to recover in this suit. Again, if the evidence shows that the defendant knew of the excavation upon the side of ——— street, upon which he was then driving, he was, in passing by such excavation, bound to use greater care than would have been required of him at some point at which there was no such place of danger.[14]

(1430) The court instructs the jury that the driver of a horse upon a public highway must use ordinary care in its management, and is liable for all damages occasioned by his careless driving. Greater care is required of one driving along a crowded street or thoroughfare within a town or city than upon an ordinary public road, where there is no such crowded condition. Therefore, if the jury believe from the evidence in the case that the defendant was driving, at the time of the accident, negligently and recklessly, and without

[13] Approved in Howard v. Inhabitants of Mendon, 117 Mass. 585.

[14] Approved in Ford v. Whiteman, 7 Am. Neg. Rep. 212, citing Pierce v. City of Wilmington, 2 Marv. 306, 43 Atl. 162; Wilkins v. City of Wilmington, 2 Marv. 132, 42 Atl. 418.

ordinary care, taking into consideration all the facts and circumstances surrounding the accident, and, as a result of such want of ordinary care, inflicted upon the plaintiff the injuries complained of, the verdict should be for the plaintiff. Ordinary care in driving a horse and vehicle means such care as prudent men ordinarily use in like circumstances, taking into consideration the time, the place, the conditions of the highway, the possible dangers, the known obstructions, and the damage likely to result from driving carelessly at that particular time and place.[15]

(1431) The court instructs the jury that even if they should believe from the evidence that the defendant was not, at the time of the injury complained of, driving at an unusual rate of speed, still, if they further believe from the evidence that the defendants did commit the injury upon the plaintiff, as charged in the declaration, while she was using due and proper care, and the defendants might by using ordinary and proper care at the time, have avoided committing such injury, and that in consequence of a want of such reasonable and ordinary care on the part of the defendants the plaintiff received the injuries complained of, then the jury should find the defendants guilty, and assess the plaintiff's damages at such sum as they may think from the testimony will compensate her for the injuries so sustained by her, not to exceed the amount claimed in the declaration.[16]

Injuries caused by runaway horse.

(1432) The court instructs the jury that even should you find from the evidence that the horse driven by the defendant at the time of the accident became at the time and at the place of the accident unmanageable, and beyond the control of the

[15] Approved in Ford v. Whiteman, 7 Am. Neg. Rep. 212, citing Clark v. Barrington, 41 N. H. 44; Tucker v. Henniker, 41 N. H. 317.

[16] Approved in Schmidt v. Sinnott, 103 Ill. 160. This instruction was objected to on account of the use of the words "due and proper care" instead of "ordinary care."

defendant, yet, if you further find from the evidence that the defendant's loss of control of the horse was due to the rapid and careless driving thereof by the defendant, then for such careless and reckless driving on the part of the defendant the plaintiff is entitled to recover. If the jury shall believe from the evidence that the horse was running away, and beyond the control of the defendant, such running away not being occasioned by any fault of the defendant, the case comes under the head of unavoidable accident, and the plaintiff cannot recover. Again, if the jury shall believe from the evidence that the defendant did all that a reasonably prudent man would have done under the circumstances to avert the accident, the plaintiff cannot recover.[17]

(1433) The court instructs the jury that the owner or driver of the horse being driven along the highway is not responsible for the consequences of his horse running away or for injuries inflicted while his horses were out of his control, provided he has used reasonable care in driving and controlling them. I charge you that the horses and truck of the defendant were being lawfully used upon the highway at the time of the collision with plaintiff's buggy; and if the collision occurred while the driver had temporarily lost control of the horse by reason,—if you should find that he was thrown from the truck in the manner that he has described, but if his loss of control was not the result of want of care on his part, the collision must be regarded as accidental, and the plaintiff could not under those circumstances recover.[18]

Injuries to bicycle riders.

(1434) The court instructs the jury that should they be-

[17] Approved in Ford v. Whiteman, 7 Am. Neg. Rep. 212, citing Bennet v. Ford, 47 Ind. 264; Shawhan v. Clarke, 24 La. Ann. 390; Bigelow v. Reed, 51 Me. 325; Benoit v. Troy & L. R. Co., 3 Am. Neg. Rep. 717, 48 N. E. 524.

[18] Approved in Silsby v Michigan Car Co., 95 Mich. 204.

lieve from the evidence that the plaintiff was not expert, or was inexperienced in the use of the wheel, yet, she had a legal right to use the bridge in question, with her wheel, and it was the duty of the county commissioners to have anticipated such use and provided for the same; and their failure to do so was negligence and the plaintiff is entitled to recover, provided she was not guilty of contributory negligence.[19]

(1435) The court instructs the jury that the plaintiff in the use of her bicycle on the bridge in question was not bound to use the carriage drive, but had the right to go over any part of the bridge open for travel.[20]

(1436) The court instructs the jury that it is the law of ——— that persons using bicycles on the public highways and bridges of the state are entitled to the same rights and subject to the same restrictions in the use thereof as are prescribed by law in the case of persons using carriages drawn by horses.[21]

(1437) The court instructs the jury that the county commissioners were bound to foresee and reasonably provide against a common danger to ordinary travel on the bridge. It may be taken as a well-known fact that bicycles when they strike obstructions in their path, even in the control of expert riders, are apt to deviate from their course and take a sudden and erratic direction, unexpected by the riders; just as no one can foretell the conduct of a frightened horse. The presence of guard rails or barriers at the point of the accident would have been a protection from the danger of going over the bridge, no matter what the movements of a bicycle would be. The aptness of bicycles to deviate from their course and to take sudden and unexpected directions when meeting obstructions in their path was ordinary knowledge and to be expected. If it were otherwise it would be extraordinary, because

[19] Approved in Strader v. Monroe, 202 Pa. 626.
[20] Approved in Strader v. Monroe, 202 Pa. 626.
[21] Approved in Strader v. Monroe, 202 Pa. 626.

contrary to common observation and experience. The county commissioners should have guarded against that which was to be expected, and it will not excuse the negligence of the commissioners, or make that negligence the remote cause to assert that they could not foresee the peculiar aptness or freak of a bicycle to take sudden and unexpected courses when meeting obstacles in its path. The injury in the case must be the natural and probable consequence of the neglect to have had up guards or barriers, and the consequence is such as, under the surrounding circumstances of this case, might and ought to have been foreseen by the county commissioners.[22]

(1438) The court instructs the jury that if the plaintiff knew of the existence of the obstruction, the plank on the bridge, or saw it before she reached it, or was careless in not observing it, and then carelessly or imprudently ran into it or on it and the accident resulted from such carelessness and imprudence, then she cannot recover. She must show you that she was reasonably careful and prudent as she rode across that bridge at the point of the accident. She must satisfy you of that first. If she has, then you may proceed to the second question.[23]

Liability of private person for injuries caused by excavation in highway.

(1439) The court instructs the jury that any person who makes an excavation in a public highway or street and who carelessly and negligently fails to provide proper safeguards for the protection of the public passing along said highways or streets is liable in damages to any person injured by reason of such excavation, if such person had no knowledge of the excavation, and such person was, at the time of the injury, in the proper use of the highway or street.[24]

[22] Approvel in Strader v. Monroe, 202 Pa. 626.
[23] Approved in Strader v. Monroe, 202 Pa. 626.
[24] Brasington v. South Bound R. Co., 62 S. C. 325.

Criminal prosecution for destruction of bridge part of highway.

(1440) The court instructs the jury that before you can convict you must be satisfied from the evidence beyond a reasonable doubt of the truth of the following propositions:

1. That the bridge in question was a public bridge.

2. That the road upon which it was placed was a public road at the time of the alleged destruction.

3. That the said road was properly established by the proper legal authorities, or was a public road by user, and was such public road at the time of the alleged destruction.

4. That the defendant, ———, willfully and unlawfully and maliciously did cut and destroy the said bridge with intent to injure the same.[25]

(1441) The court instructs the jury that if you shall be satisfied beyond a reasonable doubt that the portion of the road on which the bridge was placed had been totally abandoned as a public road for a period of five years next prior to the establishing and placing thereon the bridge in question, then it ceased to be a public road and no conviction can be had.[26]

(1442) The court instructs the jury that if the portion of the road upon which the said bridge alleged to have been destroyed was placed had not been totally abandoned as a road for a period of five years next prior to the destruction charged against the defendant, then you may find that said part of the road was a public road, provided you further find that the said road was in the original instance properly established, or has been in public use for a period of ten years next prior to the alleged destruction of said bridge.[27]

(1443) The court instructs the jury that the county commissioners had no authority to vacate the road in question unless there was first filed in the proper office the petition re-

[25] Approved in O'Dea v. State, 16 Neb. 241.
[26] Approved in O'Dea v. State, 16 Neb. 241.
[27] Approved in O'Dea v. State, 16 Neb. 241.

quired by law, properly published or posted, and any order they might make without first filing the petition and the publication or posting of the required notice would not vacate said road.[28]

(1444) The court instructs the jury that you may, in endeavoring to learn whether or not the defendant knew the bridge was a public one and located upon a properly established public road, consider that the defendant received damages from the county of W. for the land taken to constitute the part of the road upon which the bridge was located.[29]

(1445) The court instructs the jury that a public road may be properly established by user, and if the county attempted to establish the road in question and their proceedings were void, yet if the said road or the part thereof upon which the bridge was located was used as a public road, with the knowledge of the defendant, for the term of ten years just prior to the alleged destruction of said bridge, then the said road was properly established.[30]

II. Turnpikes.

Liability for injuries caused by defects in roadway.

(1446) The court instructs the jury that if they find from the evidence that the injury complained of was caused by the defective, improper and dangerously unsound condition of the defendant's road, and but for such condition would not have occurred and that such condition was known or might by the exercise of ordinary diligence have become known to the defendant a sufficient time before the accident to have prevented the same and might have been prevented by the exercise of ordinary care on the part of the defendant, then the plaintiff is entitled to recover, unless the jury shall also

[28] Approved in O'Dea v. State, 16 Neb. 241.
[29] Approved in O'Dea v. State, 16 Neb. 241.
[30] Approved in O'Dea v. State, 16 Neb. 241.

find that the plaintiff's own negligence contributed in any degree to cause his misfortune, that is to say, unless the jury shall find:

1. That he was driving a horse not ordinarily gentle and well broken, and that the accident would not have occurred had the horse answered to that description.

2. Or that he was driving with one hand so disabled from a previous ailment as to interfere with the proper management of his team and that the accident would not have occurred had the plaintiff had ordinary use of himself in that particular.

3. Or, that the plaintiff was wanting upon the occasion in question in that degree of attention, circumspection, skill and care to avoid accident, which ordinarily careful and competent drivers habitually employ, or might reasonably be expected to employ in similar circumstances.[31]

(1447) The court instructs the jury that if they shall find that the turnpike road of the defendant at the place in question was reasonably safe and fit to be driven upon with a team of two horses which were ordinarily gentle and manageable, and that one of the horses of the deceased was frightened at an object which would not ordinarily have frightened a gentle and well-broken horse, and that in consequence of which the horse got beyond the control of the plaintiff, and that the wagon was upset and the injuries to plaintiff were caused by his loss of control over said horse, then the verdict must be for the defendant.[32]

(1448) The court instructs the jury that if they believe from the evidence that defendant corporation owned and kept open for public travel the turnpike road spoken of in evidence, then it was the duty of defendant to make its said

[31] Approved in Baltimore & Liberty Turnpike Co. v. Cassell, 66 Md. 419.

[32] Approved in President, Managers & Company of the Baltimore & R. Turnpike Road v. State, 71 Md. 573.

road in such manner and in such condition as to make it safe for persons traveling over the same, using ordinary care and caution while so traveling; and if they shall further find that the defendant negligently permitted a part of its road to be in an unsafe and perilous condition for persons using same with ordinary care and caution, and that plaintiff while traveling over said road and said part and using ordinary care and caution, was injured by the upsetting of the vehicle in which he was traveling, as described in the evidence; and shall further find that the said accident was caused by the negligence of the defendant corporation in having its said road in an unsafe and perilous condition for public travel at the place of accident, and not by any negligence of the said plaintiff directly contributing thereto, then the plaintiff is entitled to recover.[33]

Burden of proof.

(1449) The court instructs the jury that the burden of proof was on the plaintiff to show that the injury complained of was caused by the defendant's negligence, and that but for such negligence the injury would not have happened; and further that unless the jury should find from the preponderance of the testimony that the death of ——— was caused solely by the defendant's negligence, the plaintiff was not entitled to recover.[34]

CHAPTER LXXV.

HOMESTEAD.

Occupation of premises as homestead, 1450.
Abandonment, 1451, 1452.

Occupation of premises as homestead.

(1450) The court instructs the jury that if you believe

[33] Approved in President, Managers & Company of the Baltimore & R. Turnpike Road v. State, 71 Md. 573.

[34] Approved in President, Managers & Company of the Baltimore & R. Turnpike Road v. State, 71 Md. 573.

from the evidence that the premises described in the petition of the plaintiff as the homestead of himself and wife were in fact used, occupied and enjoyed by said plaintiff and his said wife as their homestead up to the death of the wife, then in that case the plaintiff is entitled to recover, and your verdict will be for the plaintiff as to the homestead.[1]

Abandonment.

(1451) The court instructs the jury that if you believe from the evidence that defendant had abandoned the lot in controversy for home use and appropriated it for other than home purposes, then you will find for plaintiff, unless you believe that at the time of the levy the defendant had re-appropriated said lot for homestead purposes and was using and occupying the same with the intention of permanently using and occupying the same as a home, then in that event you will find for defendant. If you believe from the evidence that defendant had abandoned the lot in controversy for the purpose of a home, and that at the time of the levy he was using and occupying it as a sham and pretext to shield it from his creditors, then you will find for plaintiff.[2]

(1452) The court instructs the jury that if you believe from the evidence that the plaintiff abandoned his wife, and left her to shift for herself, and that he failed to support his wife, and that he voluntarily and without cause left the premises used and occupied as a homestead, and that he absented himself from said house and continued said abandonment up to the death of his said wife,—then and in that event you will find your verdict in favor of the defendant.[3]

[1] Approved in Hector v. Knox, 63 Tex. 615.
[2] Approved in Milburn Wagon Co. v. Kennedy, 75 Tex. 212.
[3] Approved in Hector v. Knox, 63 Tex. 615.

CHAPTER LXXVI.

HOMICIDE.

I. The Killing.

Causal connection between injury and death—Killing of person mortally diseased, 1453, 1454.
Same—As to contributing causes of death, 1455.
Same—Absence of medical attention does not relieve defendant of responsibility, 1456.
Same—Improper medical treatment, 1457.
Same—Acceleration of death by defendant's act, 1458.
As to the causal connection between the act or omission of accused and the death, 1459.
Willful exposure to weather, 1460.
On the presumption of cause of death, 1461.
As to the liability of defendant for a death caused in an attempt to suppress his unlawful conduct, 1462.
Where the fatal weapon was discharged by the resistance of deceased, 1463.
Death resulting from attempt to escape unlawful violence, 1464.

II. Murder and Its Incidents.

Premeditation—Act committed in the heat of passion, 1466.
Time of premeditation, 1467, 1468.
Intent to kill—As to the presumption of intent to kill from the infliction of a mortal wound, 1469-1471.
Same—Person presumed to intend the natural consequences of his own acts, 1472.
Same—Time within which intent to kill must be formed, 1473, 1474.
Same—Effect of intoxication, 1475, 1476.
Same—Where one person is killed in an attempt to kill another, 1477.
Same—As to homicide committed by a person who is engaged in the commission of a crime, 1478, 1479.
Same—As to a killing with a weapon not necessarily deadly, 1480.
Same—As to whether the weapon used was deadly, 1481.
Definition of malice aforethought, 1482, 1483.
Implied malice, 1484-1487.
Willfulness—Definition, 1488, 1489.

III. MANSLAUGHTER.

Definition of manslaughter, 1490.
Distinction between murder and manslaughter, 1491.
Nature of manslaughter, 1492.
Murder or manslaughter—Sudden combat, 1493.
Same—Weapon prepared in anticipation of combat, 1494, 1495.
Adequate cause for anger—The distinction between murder and manslaughter, 1496.
As to the nature of provocation to reduce homicide to manslaughter, 1497.
As to sufficiency of provocation to reduce the homicide to manslaughter, 1498.
Same—Consideration of weapon used as determining sufficiency of provocation to reduce to manslaughter, 1499.
Words insufficient to constitute adequate provocation, 1500.
Provocation by words inducing mutual combat, 1501.
Manslaughter and mutual combat induced by trespass upon land, 1502.
Nature of passion sufficient to reduce homicide to manslaughter, 1503.
Passion which will mitigate a homicide need not be irresistible, 1504.
Existence of cooling time, 1505, 1506.
What is sufficient cooling time, 1507.

IV. JUSTIFICATION AND EXCUSE.

Right to kill in self-defense—In general, 1508, 1509.
As to the nature of the danger which would justify the taking of a life in self-defense, 1510, 1511.
As to the requirement that the danger must be imminent, 1512.
Upon the rule that a danger need not be real, but only apparent, 1513-1515.
As to the requirement that the appearance of danger must be such as to make a reasonable man believe himself in imminent danger, 1516.
Previous threats, not accompanied by any overt act, insufficient, 1517.
Threats to be considered in connection with acts of deceased, 1518.
Bad character of deceased to be considered on issue of self-defense, 1519.
As to the duty to retreat or escape before resorting to forcible defense, 1520.
Same—Retreat not feasible, 1521.
Same—Exception as to one assaulted in his own home, 1522.
Same—Exception as to peace officer, 1523.

As to the requirement that defendant use no more force than is reasonably necessary, 1524.
As to the right to kill for the prevention of a felony, 1525.
Right to kill in defense of habitation, 1526, 1527.
As to the right of an officer to kill in making an arrest, 1528-1530.
As to self-defense by aggressor, 1531-1533.
As to right to kill in resistance of an unlawful arrest, 1534.
Accident, 1535.
Coercion by husband, 1536.

I. The Killing.

Casual connection between injury and death—Killing of person mortally diseased.

(1453) The court instructs that if the jury believe that defendant did unlawfully strike deceased as charged and if they believe that at the time of such striking deceased was and for some time prior thereto had been suffering from (peritonitis), and was then mortally ill, yet if the jury believe that the death of deceased was hastened by the blow struck by defendant, the fact that deceased was suffering from (peritonitis) and that such disease would probably have been fatal, does not extenuate defendant's guilt.[1]

(1454) The court instructs that though deceased was mortally wounded or was incurably diseased, yet if he retained any spark of vitality and the act of defendant cut short his existence and accelerated his death, defendant is responsible for the death to the same extent as if the deceased had been at the time in full health and vigor.[2]

Same—As to contributing causes of death.

(1455) The court instructs that if the jury believe from the evidence that defendant inflicted upon deceased a mortal wound which was the proximate cause of his death, he is re-

[1] People v. Lanagan, 81 Cal. 142.
[2] Jackson v. Com., 100 Ky. 239; People v. Ah Fat, 48 Cal. 61.

sponsible for such death, though other causes contributed thereto.[3]

Same—Absence of medical attention does not relieve defendant of responsibility.

(1456) The court instructs that if the jury believe from the evidence that defendant unlawfully inflicted upon deceased a wound not necessarily fatal and which might, by proper and skillful medical care, have been cured, and that the death of deceased from such wound resulted from the absence of such medical treatment and care, defendant is none the less liable for such death, and if no new, independent and proximate cause between such wound and the death shall appear other than the absence of proper medical attention, defendant is liable to the same extent as though death had resulted immediately from the wound inflicted by him.[4]

Same—Improper medical treatment.

(1457) The court instructs that if the jury believe from the evidence that defendant unlawfully inflicted upon deceased a wound from which he thereafter died, he is responsible, though such wound was aggravated by improper and unskillful medical treatment, and the death would not have resulted in the absence of such unskillfulness.[5]

Same—Acceleration of death by defendant's act.

(1458) The court instructs that though the death of deceased was not caused solely by the act of the defendant, and though such act would not have been by itself sufficient to cause death, if such act accelerated the death, defendant is liable therefor to the same extent as if death had been caused solely by his act.[6]

[3] Com. v. Fox, 7 Gray (Mass.) 586; Burnett v. State, 14 Lea (Tenn.) 439.

[4] State v. Smith, 10 Nev. 106; State v. Lane, 158 Mo. 572.

[5] Com. v. Hackett, 2 Allen (Mass.) 136; Sharp v. State, 51 Ark. 147; State v. Murphy, 33 Iowa, 270.

[6] Hackett v. People, 54 Barb. 370; Tidwell v. State, 70 Ala. 33.

As to the causal connection between the act or omission of accused and the death.

(1459) The court instructs that defendant is not responsible for the death of deceased unless it was caused by his own act or omission, or the act or omission of some other person for which he is lawfully responsible, and if the act or omission of defendant was merely a condition incident to the death and not a proximate cause thereof, he is not responsible.[7]

Willful exposure to weather.

(1460) The court instructs that if the jury believe that deceased was defendant's wife; that she was in such condition as to be unable to reach shelter or protect herself, and defendant, knowing of her condition, and, from the state of the weather and the length of time he left her, having reason to believe that leaving her there would endanger her life, did willfully leave her and that her death was caused by such exposure, then he is guilty of murder.[8]

On the presumption of cause of death.

(1461) The court instructs that if it is shown by the evidence that defendant inflicted an injury capable of causing death, and that the deceased person thereafter and within a year and a day died, it will be presumed that the death resulted from the injury so inflicted.[9]

As to the liability of defendant for a death caused in an attempt to suppress his unlawful conduct.

(1462) The court instructs that though defendant was at the time of the killing of deceased engaged in a breach of the peace, and a duly authorized peace officer in attempting to

[7] Com. v. Campbell, 7 Allen (Mass.) 541; People v. Rockwell, 39 Mich. 503.

[8] Territory v. Manton, 18 Mont. 95.

[9] Edwards v. State, 39 Fla. 753; Smith v. State, 50 Ark. 545.

suppress the same or to arrest defendant, accidentally shot and killed an innocent third person, the acts of defendant were not the proximate cause of such killing, and he cannot be held responsible therefor.[10]

Where the fatal weapon was discharged by the resistance of deceased.

(1463) The court instructs that if the jury believe from the evidence that defendant was endeavoring by the use of a deadly weapon to take the life of deceased, and in the effort of deceased to dispossess defendant of such weapon, he accidentally discharged the same and was thereby killed, defendant is liable for the death to the same extent as though the shot had been intentionally fired by him.[11]

Death resulting from attempt to escape unlawful violence.

(1464) The court instructs that if the jury believe from the evidence that defendant wrongfully made a violent and unlawful assault upon deceased, and deceased being then under a well-founded and reasonable apprehension of immediate injury, fled from the assault and in his flight accidentally fell and received injuries resulting in his death, defendant is liable for his death.[12]

(1465) The court instructs that if the jury believe from the evidence that the defendant, and others, conspired to take the life of the said deceased, whether by hanging, or otherwise; that with such premeditated design they took deceased into their custody; that they then bound his arms so as to render him helpless, forced him into a hack, and started with him to the timber on the river, with the avowed design of hanging him; that while in their custody, and thus bound,

[10] Butler v. People, 125 Ill. 641; Com. v. Campbell, 7 Allen (Mass.) 541.

[11] Murphy v. People, 37 Ill. 447.

[12] Thornton v. State, 107 Ga. 683.

and when on the bank of said river, the said deceased, from a well-founded apprehension that his life was in danger—either hoping to escape, or from a choice as to the manner of death—jumped from said hack into said river, and was drowned; and that the said defendant and others engaged with him, stood by, and permitted him to drown, making no effort to rescue said deceased, then, and in that case, the fact that the said defendant, and others engaged with him, designed to take the life of the said deceased, by hanging or otherwise, and not by drowning, is utterly immaterial, and cannot reduce the criminal nature of the act to murder in the second degree.[13]

II. Murder and Its Incidents.

Premeditation—Act committed in the heat of passion.

(1466) The court instructs that to constitute murder the act must be perpetrated not only with intent to kill, but with deliberation and with premeditation. If defendant inflicted the wound which caused death in a sudden transport of passion, excited by what the defendant then said, or disturbed by preceding events, which for the time disturbed his reasoning faculties and deprived him of the capacity to reflect, or while under the influence of some sudden and uncontrollable emotion, the act is not murder.[14]

Time of premeditation.

(1467) The court instructs that the law knows no specific time within which an intent to kill must be formed so as to make it murder. If the will accompanies the act a moment antecedent to the act itself which causes death, it is as sufficient to make the offense murder as if it were a day or any other time.[15]

(1468) The court instructs the jury that "deliberately"

[13] State v. Shelledy, 8 Iowa, 477.

[14] People v. Barberi, 149 N. Y. 256. See, also, post, subd. 3.

[15] State v. Anderson, 2 Overt. (Tenn.) 6.

means in a cool state of the blood. It does not mean brooded over or reflected upon for a week, a day, or an hour, but it means an intent to kill, executed by the defendant, in a cool state of the blood, in furtherance of a formed design to gratify a feeling of revenge, or to accomplish some other unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some provocation.[16]

Intent to kill—As to the presumption of intent to kill from the infliction of a mortal wound.

(1469) The court instructs that the killing must have been willfully done to constitute the offense murder, but willfully means intentionally, not accidentally, and in the absence of qualifying facts, the law presumes that a person intends the natural and probable result of his acts, so that if the jury believe from the evidence beyond a reasonable doubt that defendant being armed with a revolver shot the deceased in a vital part and killed him, they should find that defendant intended to kill, until the facts show a contrary intent.[17]

(1470) A mortal wound given with a deadly weapon in the previous possession of the slayer, without any, or upon very slight, provocation, is prima facie willful, deliberate, and premeditated killing, and throws upon the accused the necessity of proving extenuating circumstances.[18]

(1471) The court instructs the jury that if they believe from the evidence that the defendant willfully, that is intentionally, used upon deceased, at some vital part, a deadly weapon, as a loaded revolver or pistol, in the absence of qualifying facts, defendant must be presumed to know that the effect is likely to be deadly, and knowing this must be presumed to intend death, which is the probable and ordinary consequence of such an act, and if such deadly weapon is used without just cause or provocation he must be presumed

[16] State v. Gee, 85 Mo. 647.
[17] State v. Silk, 44 S. W. 764.
[18] Gray v. Com., 92 Va. 772.

to do it wickedly, or from a bad heart, and if the jury believe that defendant took the life of deceased by shooting him in a vital part with a revolver or pistol with a manifest design to use such weapon upon him, and with sufficient time to deliberate and fully form the conscious purpose to kill, and without sufficient reason, or cause or extenuation, then such killing is murder in the first degree, and whilst it devolves on the state to prove the willfulness, deliberation, and malice aforethought, all of which are necessary to constitute murder in the first degree, yet these need not be proved by direct evidence, but may be deduced from all the facts and circumstances attending the killing, and if the jury are satisfied and reasonably infer their existence from all the evidence, they will be warranted in finding defendant guilty of murder in the first degree.[19]

Same—Person presumed to intend the natural consequences of his own acts.

(1472) The court instructs that a person must be presumed to intend to do that which he voluntarily and willfully does in fact do, and he must be presumed to intend all the natural, probable and usual causes of his own acts.[20]

Same—Time within which intent to kill must be formed.

(1473) The court instructs that the time for deliberation and premeditation need not be long. If it furnishes room and opportunity for reflection, and the facts show that such reflection existed, and that the mind was busy with its design, and made the choice with full chance to choose otherwise, there is sufficient deliberation.[21]

(1474) The court instructs that all the law requires is that there should be some reflection and some thought preceding the blow. If there is thought, if there is reflection on the act

[19] State v. Wisdom, 84 Mo. 177
[20] Com. v. Webster, 5 Cush. (Mass.) 295.
[21] People v. Beckwith, 103 N. Y. 360.

and if there is a choice and a determination as the result of these mental actions, then there is sufficient deliberation within the law.[22]

Same—Effect of intoxication.

(1475) The court instructs that though the fact of intoxication at the time of the commission of a crime is no excuse or justification therefor, yet where it is essential to the crime charged in the indictment that a particular and specific intent be at the time entertained, the fact of intoxication is material upon the capacity of the defendant to entertain such an intent. And in this case if the jury believe from the evidence that at the time of the commission of the homicide, defendant was by reason of intoxication incapable of entertaining an intent to kill, he cannot be convicted of murder, but if at all only of some degree of homicide, to which such an intent is not material.[23]

(1476) The court instructs the jury that if they believe from the evidence beyond a reasonable doubt, that the prisoner gave the deceased the wound from which she died, as charged in the indictment, and that though he was at the time of committing the act so intoxicated as to render him incapable of forming a willful, deliberate and premeditated purpose, yet if they believe from the evidence, beyond a reasonable doubt, that the prisoner, before becoming intoxicated, or while he was, though drinking, still in a condition in which he was capable of forming a willful, deliberate and premeditated purpose, had formed a willful, deliberate and premeditated purpose to kill the deceased, and that he afterwards in pursuance of that purpose, so formed, gave the deceased the wound from which she died as charged in the indictment, then they are instructed that such an act upon the part of the prisoner, though he may have been intoxicated at the time of

[22] People v. Hawkins, 109 N. Y. 408.
[23] People v. Fish, 125 N. Y. 136.

committing it, constituted in the eye of the law a willful, deliberate and premeditated killing and as such is murder in the first degree.[24]

Same—Where one person is killed in an attempt to kill another.

(1477) The court instructs that if defendant willfully and with malice aforethought fired the fatal shot with intent to kill a person other than deceased, and deceased was actually killed thereby, the crime is murder, though there was no actual intent to produce the result.[25]

Same—As to homicide committed by a person who is engaged in the commission of a crime.

(1478) The court instructs that if two or more persons engage together in the commission of a crime and in the execution thereof, or in an effort to resist arrest, one of them shall commit a homicide, all are responsible therefor to the same extent as if such homicide had been originally contemplated.[26]

(1479) The court instructs that where two or more persons combine to do an unlawful act, and death happen to another party in the prosecution of the unlawful act designed, it is murder in all who thus conspire, whether they were present at the time of the death or not. If the unlawful act, contemplated or designed, was to take the life of a human being, or to commit arson, burglary, mayhem, or robbery, it is murder in the first degree. If the design or intention was to commit any unlawful act, it is murder in the second degree, or manslaughter, according to the circumstances.[27]

Same—As to a killing with a weapon not necessarily deadly.

(1480) The court instructs that if you believe from the evidence that the defendant killed the deceased by striking

[24] Reed v. Com., 98 Va. 817.
[25] Dunaway v. People, 110 Ill. 333.
[26] Ritzman v. People, 110 Ill. 362; McMahan v. People, 189 Ill. 222.
[27] State v. Shelledy, 8 Iowa, 477.

him on the head with a stick, that the size of the stick was such, that in the hands of a man of ordinary strength, striking a violent blow with it on the head, it was a dangerous weapon, and that the necessary consequence of the blow struck by the defendant, with such a stick, upon the head of the deceased, was to destroy his life, and that his death was caused by such a blow, you should find defendant guilty of murder.[28]

Same—As to whether the weapon used was deadly.

(1481) The court instructs that if you believe, from the evidence, that the stick in question was a large one, and that the necessary consequence of a violent blow with it on the head, by a man of ordinary strength, would be to destroy human life, the law regards such a stick, when used in striking a fellow creature, as a deadly weapon; and if you further believe, from the evidence, that defendant struck deceased with such a stick upon the head, and thereby caused his death, he is guilty of murder.[29]

Definition of malice aforethought.

(1482) The court instructs that murder is the killing of any person with malice aforethought, either express or implied by law. Malice in this definition is used in a technical sense including not only anger, hatred and revenge, but every unlawful and unjustifiable motive. It is not confined to ill will toward one or more individual persons, but is intended to denote an action flowing from any wicked or corrupt motive and thing done malo animo, where the act has been attended with such circumstances as to carry in them the plain indications of a heart regardless of social duty and fatally bent on mischief, therefore, malice is implied from any deliberate or cruel act against another, however sudden.[30]

(1483) The court instructs the jury that malice, as used

[28] Davis v. People, 19 Ill. 73, 75.
[29] Davis v. People, 19 Ill. 73, 75.
[30] Com. v. Webster, 5 Cush. (Mass.) 295.

in the indictment, does not mean mere spite, ill will, or dislike, as it is ordinarily understood, but it means that condition of the mind which prompts one person to take the life of another without just cause or justification, and it signifies a state of disposition which shows a heart regardless of social duty, and fatally bent on mischief. Malice aforethought means that the act was done with malice and premeditation.[31]

Implied malice.

(1484) The court instructs that implied malice exists when there is no actual intent to kill any person, but death is caused by conduct which the law regards as showing such an abandoned state of mind as to be equivalent to an actual intent to kill. From such conduct the law implies malice.[32]

(1485) The court instructs that malice is implied by law where there was a voluntary act of killing not induced by any apparent or apprehended danger to defendant and without such provocation as is calculated to excite irresistible passion.[33]

(1486) The court instructs that malice includes not only anger, hatred and revenge, but any other unlawful and unjustifiable motive, and thing done with a wicked mind and attended by such circumstances as plainly to indicate a heart regardless of social duty and fatally bent on mischief, show malice. Hence malice is implied by law from any cool and deliberate act against another, however sudden, which shows an abandoned and wicked heart.[34]

(1487) The court instructs that where a person commits an act wantonly and with a total disregard of the lives of others, malice will be imputed to such act, though there was no

[31] State v. Gee, 85 Mo. 647.
[32] Hadley v. State, 55 Ala. 31.
[33] Peri v. People, 65 Ill. 17.
[34] State v. Dolan, 17 Wash. 499.

actual malice entertained against the person injured thereby.[35]

Willfulness—Definition.

(1488) The court instructs the jury that the word willful, as used in the indictment and in these instructions, means, intentionally, that is, not accidentally; deliberately means in a cool state of the blood, that is, not in the heat of passion; premeditated means thought of beforehand for any length of time however short; malice in the instructions does not mean hatred or ill will, as it commonly does, but it means the intentional doing of a wrongful act; heat of passion, as used in these instructions, means a condition of quick anger or sudden injury, engendered by a real or supposed grievance suffered at the time, and in order to reduce the crime from murder in the first to murder in the second degree, the killing must be done upon the instant the provocation is given, before the blood has had time to cool and reason to resume its sway, before the mind has time to consider the character and gravity of the act about to be done, and not from hatred or for pre-existing revenge.[36]

(1489) The court instructs the jury that the word "willfully," as used in these instructions, means intentionally, not accidentally. "Deliberately" does not mean brooded over, considered or reflected upon for a week, a day or an hour, but it means an intent to kill, executed by the defendant in a cool state of the blood in furtherance of a formed design to gratify a feeling of revenge or to accomplish some other unlawful purpose and not under the influence of a violent passion suddenly aroused by a real or supposed grievance amounting to a temporary dethronement of reason. A heated state of the blood produced by no legal or adequate cause of provocation is discarded, but when produced by such a provocation, it is by the law denominated passion or excitement of mind.

[35] Mayes v. People, 106 Ill. 306; Davison v. People, 90 Ill. 221.
[36] State v. Jones, 78 Mo. 278.

When the mental excitement or passion is suddenly produced by an adequate cause of provocation such as opprobrious epithets and the like, and is produced to such a degree as to materially impede or interfere with the reason or judgment, then there can be no legal deliberation in an act done under its immediate and sudden influence, and when this passion is produced by an assault or personal violence not provoked by the defendant, and such passion thus aroused is so violent as to render one not unconscious of the act, but deaf to the voice of reason, and under the control of such a passion he suddenly acts, it is not an act of deliberation or of malice. "Premeditatedly" means thought of beforehand, for any length of time however short. "Malice" as used in the indictment, does not mean, in the legal sense, mere spite, ill will or dislike, as it is ordinarily understood, but it means that condition of mind which prompts one person to take the life of another, without just cause or justification, and signifies the state of disposition which shows a heart regardless of social duty and fatally bent on mischief; and malice aforethought means that the act was done with malice and premeditation.[37]

III. Manslaughter.

Definition of manslaughter.

(1490) The court instructs that manslaughter is the unlawful killing of another without malice and may be either voluntary, as where the act is committed with a real design and purpose to kill, but through the violence of sudden passion occasioned by some great provocation, which in tenderness for the frailty of human nature, the law considers sufficient to palliate the criminality of the offense, or involuntary, as where the death of another is caused by some unlawful act not accompanied with any intention to take a life.[38]

[37] State v. Thomas, 78 Mo. 327.

[38] Com. v. Webster, 5 Cush. (Mass.) 295.

Distinction between murder and manslaughter.

(1491) The court instructs that from the definition given, it will be perceived that the characteristic distinction between murder and manslaughter is the existence of malice, express or implied. It therefore becomes necessary in every case of homicide to ascertain with some precision the nature of legal malice and what evidence is requisite to establish its existence. The rule is that the implication of malice arises in every case of intentional homicide, and the fact of killing being first proved, all the circumstances of accident, necessity or infirmity are to be established by the party charged, unless they arise out of the evidence produced against him to prove the homicide, where the fact of killing is proved by satisfactory evidence and there are no circumstances disclosed tending to show justification or excuse, and there is nothing to rebut the natural presumption of malice. This rule is founded on plain and obvious principles that a person must be presumed to intend that which he voluntarily and willfully does, and that he must intend all the natural, probable and usual consequences of his own acts. On the other hand, if death, though willfully intended, appears to have been inflicted immediately after provocation given by deceased, which provocation is deemed by law adequate to excite sudden and angry passions, this fact rebuts the presumption of malice, but the homicide is still unlawful, because a man is bound to curb his passions and the offense is accordingly manslaughter.[39]

Nature of manslaughter.

(1492) The court instructs that the true nature of manslaughter is that it is a homicide mitigated out of tenderness to the frailty of human nature. Every man when assailed with violence or great rudeness is inspired with a sudden impulse of anger, which puts him upon resistance before time

[39] Com. v. Webster, 5 Cush. (Mass.) 295.

for cool reflection; if during that period he attacks his assailant with a weapon likely to endanger life and death ensues, it is regarded as done through heat of blood and violence of anger and not through malice. The same rule applies to a homicide in mutual combat which is attributed to sudden and violent anger occasioned by the combat, and not to malice. Where two meet, not intending to quarrel and angry words suddenly arise and a conflict springs up, in which blows are given on both sides, it is a mutual combat, without much regard to who is the assailant, and if no unfair advantage be taken in the outset, and an occasion is not sought for the purpose of gratifying malice, and one seizes a weapon and strikes a deadly blow, it is regarded as homicide in the heat of blood, and though not excusable, it is not murder, but manslaughter only.[40]

Murder or manslaughter—Sudden combat.

(1493) The court instructs that if two persons meet and hot words follow, and that is followed by a combat, which is calculated to stir the blood and arouse the passions, and that in the midst of that struggle, one takes the life of the other, such killing is manslaughter and not murder.[41]

Same—Weapon prepared in anticipation of combat.

(1494) The court instructs that if the jury believe from the evidence that defendant and deceased mutually engaged in a personal combat without weapons, but that defendant in anticipation of such combat had without the knowledge of deceased provided himself with a deadly weapon and in the course of the combat so mutually agreed upon, did kill deceased by the use of such deadly weapon, the offense is murder and not manslaughter.[42]

(1495) The court instructs the jury that although they

[40] Com. v. Webster, 5 Cush. (Mass.) 295.
[41] State v. Way, 38 S. C. 333.
[42] State v. Christian, 66 Mo. 138.

may believe from the evidence that the deceased took hold of the revolver of the defendant and a struggle took place between them, yet, if they further believe from the evidence that the defendant intended to shoot the deceased and was threatening to shoot the deceased, and to prevent such shooting by defendant deceased took hold of said revolver, and attempted to take it away from defendant, and in the struggle defendant, intending to shoot deceased, did shoot and kill him, the jury cannot find defendant guilty of manslaughter, but will be warranted in finding defendant guilty of murder in the second degree if such killing was intentionally done, and thought of beforehand by defendant; and if they further believe from the evidence beyond a reasonable doubt that such killing was deliberately done by defendant, they will find him guilty of murder in the first degree.[43]

Adequate cause for anger—The distinction between murder and manslaughter.

(1496) The court instructs that where a voluntary homicide takes place under the immediate influence of sudden passion, and no cause exists which will in law justify or excuse its commission, the true test to determine whether such homicide is manslaughter or murder in the second degree is: "Was there adequate cause to produce such passion?" If there was such adequate cause, the homicide will be manslaughter. If there was not such adequate cause, the homicide will be murder in the second degree. By the expression "adequate cause" is meant, such as would commonly produce a degree of anger, rage, resentment or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection. In order to reduce a voluntary killing to the grade of manslaughter, it is necessary not only that an adequate cause exist to produce a degree of anger, rage, resentment or terror sufficient to render the mind incapable of cool

[43] State v. Wisdom, 84 Mo. 177.

reflection, but also that such state of mind did actually exist at the time of the commission of the offense.[44]

As to the nature of provocation to reduce homicide to manslaughter.

(1497) The court instructs that a homicide is committed under the immediate influence of sudden passion (1) where the provocation arises at the time of the commission of the offense, so that the passion is not the result of former provocation; (2) the act is caused directly by passion arising out of such provocation, it not being enough that the mind be agitated by passion arising from some other provocation or provocation given by some person other than the person guilty.[45]

As to sufficiency of provocation to reduce the homicide to manslaughter.

(1498) The court instructs that the provocation which will reduce a homicide from murder to manslaughter is something the natural tendency of which would be to disturb and obscure the reason to an extent which might render the average man of fair average mind and disposition liable to act rashly or without due deliberation or reflection, and from passion rather than judgment, and something which the jury are satisfied did so disturb and obscure the reason of the defendant in this case; that the homicide was the result of provocation and not of willful and deliberate malice.[46]

Same—Consideration of weapon used as determining sufficiency of provocation to reduce to manslaughter.

(1499) The court instructs that if the jury finds that the homicide was committed in the heat of passion, on sudden provocation, they must then take into consideration the character of the weapon used by defendant, and if a deadly weap-

[44] Kemp v. State, 13 Tex. App. 561.
[45] Kemp v. State, 13 Tex. App. 561.
[46] State v. Hoyt, 10 Minn. 132.

on was used, the provocation given defendant must have been great indeed to reduce the crime from murder to manslaughter.[47]

Same—Words insufficient to constitute adequate provocation.

(1500) The court instructs that in considering what is regarded as such adequate provocation, it is a settled rule of law that no provocation by words, however opprobrious, will mitigate an intentional homicide, so as to reduce it to manslaughter. Therefore, if upon provoking language given, the party immediately revenges himself by the use of a dangerous and deadly weapon likely to cause death, the homicide is not mitigated to manslaughter by the circumstances and is homicide with malice aforethought within the definition of murder.[48]

Same—Provocation by words inducing mutual combat.

(1501) The court instructs that though mere words, however provoking, do not constitute sufficient provocation to reduce homicide to manslaughter, this rule does not apply where because of insulting words or gestures, persons become suddenly heated and engage in mutual combat without dangerous weapons, and where in such a combat provoked by the use of insulting words, defendant in the heat of combat, seizes upon a deadly weapon, and strikes a fatal blow, the offense is manslaughter only.[49]

Same—Manslaughter and mutual combat induced by trespass upon land.

(1502) The court instructs that though a mere trespass on land is not sufficient to reduce an intentional killing to manslaughter, a man may oppose force to force to prevent a tres-

[47] State v. Hoyt, 10 Minn. 132. Where the homicide was committed in sudden combat, the question of provocation becomes immaterial, and the application of the above instruction to such cases is erroneous. State v. Hoyt, supra.

[48] Com. v. Webster, 5 Cush. (Mass.) 295.

[49] State v. Hill, 4 Dev. & B. (N. C.) 491.

pass, if he does not use a deadly weapon or unnecessary force, and if during the encounter so resulting, he should kill the trespasser from passion induced by such combat, the offense will be manslaughter and not murder.[50]

Nature of passion sufficient to reduce homicide to manslaughter.

(1503) The court instructs that it is not necessary that the reason should be entirely dethroned or overcome by passion, so as to destroy all intelligent volition, but merely that the exercise of judgment should by adequate provocation be impeded and disturbed by the violence of excitement.[51]

Passion which will mitigate a homicide need not be irresistible.

(1504) The court instructs that the passion which in law rebuts the imputation of malice, so as to reduce the killing to manslaughter, need not be so overpowering as for the time to shut out knowledge and destroy volition, but that heated condition of the mind which would render a reasonable man deaf to the voice of reason so that although the act done was likely to produce death, it was not the result of malignity of heart, but imputable to the infirmities of human nature. There is no necessity that the reason should be dethroned, or that the slayer should act in a whirlwind of passion, but there must be a sudden passion upon reasonable provocation apparently sufficient to make the passion irresistible.[52]

Existence of cooling time.

(1505) The court instructs that provocation cannot be considered for the purpose of reducing the homicide from murder to manslaughter, unless the provocation was so recent that the homicide was committed in a transport of passion occasioned by that provocation. If between the provocation and the homicide, there was a sufficient time for the blood to cool and for the passion to subside and reason to interpose,

[50] Com. v. Drew, 4 Mass. 391.
[51] Maher v. People, 10 Mich. 212.
[52] May v. People, 8 Colo. 210.

the provocation, however great, cannot be considered. In determining the time for the passion to cool, the inquiry is whether the suspension of reason arising from sudden passion continued from the time of the provocation to the very instant of the homicide, and if from the circumstances, it appears that defendant reflected or deliberated, or if in legal presumption, there was time or opportunity for reflection and deliberation and for the passion to subside, the provocation is not to be considered and the offense is murder.[53]

(1506) The court instructs that in determining the time for the passion to cool, the inquiry is, whether the suspension of reason, arising from sudden passion, continued from the time of provocation, till the very instant the act producing death took place; and that if, from any circumstances whatever, it appears that the parties reflected or deliberated, or if, in legal presumption, there was time or opportunity for cooling, that then the provocation cannot be considered by the jury in making up their verdict.[54]

What is sufficient cooling time.

(1507) The court instructs that the reasonable time within which the law presumes that the blood has cooled, and the angry passion aroused by the provocation has subsided, is the time within which an ordinarily reasonable man would cool under like circumstances. In applying this test all circumstances attending the homicide are to be taken into consideration including the nature and extent of the provocation, the physical and mental condition of defendant, his condition in life and peculiar situation at the time of the homicide, his education and habits and his conduct, manner and conversation throughout the altercation. In a word, all pertinent circumstances may be considered, and the time in which an ordinary man in like circumstances would have cooled, is the reasonable time.[55]

[53] State v. Shelledy, 8 Iowa, 485.
[54] State v. Shelledy, 8 Iowa, 485.
[55] State v. McCants, 1 Spear (S. C.) 384.

IV. JUSTIFICATION AND EXCUSE.

Right to kill in self-defense—In general.

(1508) The court instructs that if a person is assaulted in such a manner as to produce on the mind of a reasonable person a belief that he is in actual danger of losing his life or of suffering great bodily harm, he will be justified in defending himself, though the danger be not real but only apparent. Such person will not be held responsible criminally if he acts in self-defense from real and honest convictions as to the character of the danger induced by reasonable evidence, though he may be mistaken as to the extent of the actual danger.[56]

(1509) The court instructs the jury that the right to defend one's self against danger, not of his own seeking, is a right which the law not only concedes but guaranties to all men. The defendant may therefore have killed deceased and still be innocent of any offense against the law. If, at the time he stabbed deceased he had reasonable cause to apprehend on the part of the deceased, a design to do him some great personal injury, and there was reasonable cause for him to apprehend immediate danger of such design being accomplished, and to avert such apprehended danger he stabbed, and at the time he did so, he had reasonable cause to believe, and did believe it necessary for him to use his knife in the way he did, to protect himself from such apprehended danger, then, and in that case, the stabbing was not felonious, but was justifiable, and you ought to acquit him upon the ground of necessary self-defense. It is not necessary to this defense that the danger should have been actual or real, or that the danger should have been impending and immediately about to fall. All that is necessary is that defendant had reasonable cause to believe and did believe these facts. But before you acquit on the ground of self-defense, you ought to believe

[56] Crews v. People, 120 Ill. 317.

that defendant's cause of apprehension was reasonable. Whether the facts constituting such reasonable cause have been established by the evidence, you are to determine, and unless the facts constituting such reasonable cause have been established by the evidence in the cause, you cannot acquit in such case, on the ground of self-defense, even though you may believe that defendant really thought he was in danger.

But, on the other hand, gentlemen, the law does not permit a person to voluntarily seek or invite a combat, or put himself in the way of being assaulted, in order that when hard pressed he may have a pretext to take the life of his assailant. The right of self-defense does not imply the right of attack, and it will not avail in any case where the difficulty is sought for and induced by the party by any willful act of his, or where he voluntarily and of his own free will, enters into it; no matter how imminent his peril may become during the progress of the affray. The necessity being of his own creation, shall not operate to excuse him. Nor is any one justified in using any more force than is necessary to get rid of his assailant. But if he does not bring on the difficulty nor provoke it, nor voluntarily engage in it, he is not bound to flee to avoid it, but may resist with adequate and necessary force until he is safe.

Now, if you believe from the evidence in this cause that the defendant voluntarily sought or invited the difficulty in which deceased lost his life, or that he provoked or commenced, or brought it on by any willful act of his own, or that he voluntarily and of his own free will, engaged in it, then, and in that case, you are not authorized to acquit him upon the ground of self-defense, and this is true no matter how violent his passion became, or how hard soever he was pressed, or how imminent his peril became during the progress of the affray. In determining who provoked or commenced the difficulty, or made the first assault, you should take into con-

sideration all the facts and circumstances in evidence before you.[57]

As to the nature of the danger which would justify the taking of a life in self-defense.

(1510) The court instructs that a homicide is not justified on the ground of self-defense, unless it is apparently necessary to save the life of the slayer or to prevent some felony or to save him from great bodily harm; the apprehension of no other danger will justify the resort to so extreme a measure as the taking of life.[58]

(1511) The court instructs the jury that if they believe from the evidence that the defendant, with a pistol, willfully shot and killed the deceased, as charged in the indictment, then before such killing can be justified on the ground of self-defense, it must appear to the reasonable satisfaction of the jury from the whole of the evidence that the defendant, at the time of shooting had reasonable cause to believe, and did believe that the deceased was about then to kill him, (the defendant,) or do him some great bodily harm; and that defendant had reasonable cause to believe, and did believe that there was immediate danger of such design on the part of deceased being accomplished; and that the defendant did shoot and kill deceased to prevent such immediate harm to himself, and not to gratify a grudge.[59]

As to the requirement that the danger must be imminent.

(1512) The court instructs that a bare fear, however well grounded, that another intends to kill defendant or do him great bodily harm will not justify a killing, unless there is some overt act indicating a purpose to immediately carry out such an intention.[60]

[57] State v. Thomas, 78 Mo. 327.

[58] Jones v. State, 76 Ala. 8; Graschia v. People, 53 Ill. 295.

[59] State v. Jones, 78 Mo. 278.

[60] State v. Sullivan, 51 Ill. 142; State v. Shippey, 10 Minn. 223.

Upon the rule that a danger need not be real, but only apparent.

(1513) The court instructs that men, when threatened with danger must determine from the appearance and actual state of things surrounding them as to the necessity of resorting to force in self-defense, and if they act from reasonable and honest convictions, they will not be held responsible for a mistake in the extent of the actual danger, where other judicious men would have been alike mistaken.[61]

(1514) The court instructs that danger which will justify a killing in self-defense need not be real but only such as would lead a reasonably prudent man to believe in its reality and in estimating the nature and imminence of the danger and in the choice of the means to avoid it or the amount of force to be used in repelling it, the excitement and confusion of the surrounding circumstances must be considered and defendant is not to be held to the same cool and deliberate judgment in estimating the danger or the choice of means for repelling it as is possible to persons unaffected by excitement or danger in subsequently contemplating the situation.[62]

(1515) The court instructs that where one, without fault, is attacked by another and kills his assailant, if the circumstances furnish reasonable ground for apprehending a design to take his life or do him some great bodily harm and for believing the danger imminent, and that such design will be accomplished, the homicide is justifiable, though it may turn out that the appearances were false and that there was in fact no such design nor any danger of its being accomplished.[63]

[61] Campbell v. People, 16 Ill. 17.

[62] Patten v. People, 18 Mich. 314.

[63] People v. Sullivan, 7 N. Y. 396; Patterson v. People, 46 Barb. 625. An instruction is not rendered erroneous because it uses the word "serious" instead of "great" in defining the apprehended injury (Lawler v. People, 74 Ill. 228); but the use of the term "most serious" renders the instruction erroneous (Riens v. People, 30 Ill. 256).

As to the requirement that the appearance of danger must be such as to make a reasonable man believe himself in imminent danger.

(1516) The court instructs that it is not enough that defendant believe himself in danger, unless the facts were such that the jury in the light of all the facts and circumstances known to defendant at the time or by him then believed to be true, can see that as a reasonable man he had ground for such belief.[64]

Previous threats, not accompanied by any overt act, insufficient.

(1517) The court instructs that though the deceased may have made previous threats of a violent nature against the defendant, if you find that the deceased at the time he was killed did nothing to excite in the mind of the defendant any fear that he was about to execute those threats, the threats which had previously been made by him are not sufficient to justify the killing as having been done in self-defense.[65]

Threats to be considered in connection with acts of deceased.

(1518) The court instructs that though mere threats are insufficient to justify a killing as in self-defense, if the jury believe that prior to the homicide, deceased made threats of a violent nature against the defendant, and the evidence leaves the jury in doubt as to what the acts of the deceased were at the time of the homicide, or as to what defendant might properly have apprehended in respect to the intentions of deceased, the jury are entitled to consider the threats in connection with the other evidence in determining who was probably the aggressor, and in determining what apprehen-

The use of the word "absolutely," in reference to the necessity of killing, does not invalidate the instruction. Belt v. People, 97 Ill. 461.

[64] Todd v. State, 44 S. W. 1096.

[65] Mize v. State, 36 Ark. 661.

sion might reasonably arise in the mind of defendant from the conduct of the deceased.[66]

Bad character of deceased to be considered on issue of self-defense.

(1519) The court instructs that the mere fact that the deceased was a man of bad character and of a violent and dangerous temper and proclivities, does not justify the taking of his life, but that such character, if it shall appear from the evidence, is a proper matter for the jury to consider, and it should be considered in determining whether or not the deceased by his acts at the time of the homicide, gave the defendant reasonable cause to apprehend an intention on the part of deceased to take his life or to do him great bodily harm.[67]

As to the duty to retreat or escape before resorting to forcible defense.

(1520) The court instructs that before a party can justify the taking of life in self-defense, he must show that there was reasonable ground for believing that he was in great peril and that the killing was necessary for his escape and that no other safe means was open to him. When one believes himself about to be attacked by another, and to receive great bodily injury, it is his duty to avoid the attack, if it is in his power to do so; a right of self-defense does not arise until he has done everything in his power to avoid this necessity.[68]

Same—Retreat not feasible.

(1521) The court instructs that though it is the duty of defendant to avoid a threatened danger by retreat, if possible, he need retreat only when he can do so with safety and if the assault upon him be so fierce and the danger so immediately threatening as not to allow him to retire from the assault or

[66] Mize v. State, 36 Ark. 661.
[67] State v. Vansant, 80 Mo. 67.
[68] People v. Kennedy, 159 N. Y. 346.

delay in defending himself therefrom without manifest danger, he may kill his assailant instantly, and the homicide will be justifiable.[69]

Same—Exception as to one assaulted in his own home.

(1522) The court instructs that one who is feloniously assaulted in his own house is not bound to retreat even though by doing so he might secure his safety, but he may stand his ground and take his assailant's life if it becomes necessary, and the homicide is justifiable.[70]

Same—Exception as to peace officer.

(1523) The court instructs that a peace officer finding himself resisted in the performance of his duty is not obliged to decline the combat, but may persist in the exercise of such force as is reasonably necessary and will be justified in slaying his antagonist under circumstances where a private person would be required to seek safety by flight.[71]

As to the requirement that defendant use no more force than is reasonably necessary.

(1524) The court instructs that the law only allows a person to use such force as may be necessary to overcome the force that may be used against him or which he believes is being used or about to be used against him and where it does not reasonably appear to defendant that his assailant intends to kill him or inflict serious bodily injury, or where it does not appear to defendant as a reasonable man that death or serious bodily injury can be escaped only by the taking of life, he is not justified in killing the deceased in his defense.[72]

As to the right to kill for the prevention of a felony.

(1525) The court instructs that one who is opposing and endeavoring to prevent the consummation of a felony by

[69] Brown v. Com., 86 Va. 466; State v. Tweedy, 5 Iowa, 433.
[70] State v. Donnelly, 69 Iowa, 705; Pond v. People, 8 Mich. 150.
[71] Lynn v. People, 170 Ill. 572.
[72] Willford v. State, 42 S. W. 972.

others may properly use all necessary force for that purpose and resist all attempts to inflict bodily injury upon himself and may lawfully detain the felons and hand them over to the officers of the law, and if the jury believe from the evidence that the defendant in this case was seeking to so prevent the commission of a felony or to so apprehend the felons and used no wanton violence in so doing, he was justified in the exercise of such force as might be reasonably necessary for that purpose.[73]

Right to kill in defense of habitation.

(1526) The court instructs that a homicide is justifiable when committed by one into whose residence deceased was endeavoring in a violent manner to force himself with the intention of unlawfully assaulting the owner therein.[74]

(1527) The court instructs that if the jury believe from the evidence that just prior to his death, the deceased attempted in a violent manner to enter the dwelling of defendant for the purpose of assault or offering personal violence to the defendant or any person dwelling or being therein, and that the defendant in reasonably resisting such attempt, unintentionally and without malice killed the deceased, the killing was justifiable and defendant should be acquitted. In considering whether the killing was in defense of habitation, the jury should consider the circumstances attending the killing and the conduct of the parties immediately previous thereto and the means and force used.[75]

As to the right of an officer to kill in making an arrest.

(1528) The court instructs that where the officer had no warrant, a homicide committed in pursuing an escaped criminal can be justified only by showing the actual commission of a felony by the deceased and that there was a positive ne-

[73] Ruloff v. People, 45 N. Y. 213.
[74] Reins v. People, 30 Ill. 256.
[75] Greschia v. People, 53 Ill. 298.

cessity to take a life in order to arrest or detain him, it is not enough for the officer in such a case to show that he had reasonable ground to believe that deceased had been guilty of a felony or that he had reasonable ground to believe that deceased would otherwise accomplish an escape.[76]

(1529) The court instructs that the mere fact that a person is seen to run upon a public street in the nighttime when pursued, furnishes no justification to an officer to shoot at him, though burglaries have been recently committed in the neighborhood. Prudence and a proper estimate of human life should deter an officer from hasty and inconsiderate resort to such an extreme measure and there must exist a present necessity arising under such circumstances as clearly indicate that a resort to the use of a deadly weapon is not only necessary but at least apparently unavoidable.[77]

(1530) The court instructs that while private persons may arrest another, where a public offense is committed, or attempted, in their presence, or when a felony had been committed, and they have reasonable cause for believing the person arrested, to have committed it; yet in such a case, the persons making the arrest, must confine themselves within the strict limits of the law, and if they exceed those limits, the person, or persons, making the arrest, become trespassers ab initio—all their acts are void—and they are liable for the consequences; and if the jury believe from the evidence, that the defendant, and others then engaged with him, went to the house of deceased, knowing that a felony had been committed, and having reasonable cause to believe that deceased committed it, for the purpose of arresting the said deceased; that before, or at the time of arresting the said deceased, they determined to make him confess the commission of the alleged felony, by the use of personal violence; that in pursuance of this determination, they bound his arms, forced him into a hack,

[76] Conraddy v. People, 5 Park. Cr. R. 234.
[77] People v. McCarthy, 47 Hun, 49.

and started with him to the timber, that while on the road to the timber, the said deceased, from a reasonable apprehension that his life was in danger, or in the hope of escaping from the threatened punishment, jumped from the said hack, thus bound, into the river, and was drowned, that then, and in that case, the said defendant, and those acting with him, are trespassers from the beginning—the original arrest became unlawful—and the defendant is guilty of murder in the second degree.[78]

As to self-defense by aggressor.

(1531) The court instructs that if defendant commenced the combat or brought it on by his own willful and unlawful act or if he voluntarily entered into the same or if he entered into it for the purpose of taking advantage of deceased and of taking his life or doing him some great bodily harm, then he cannot avail himself of the plea of self-defense, however imminent may have been the peril in which he was subsequently placed.[79]

(1532) The court instructs the jury that if they believe from the evidence that defendant sought the deceased and provoked or brought on the difficulty which resulted in the death of the deceased by any unlawful act of his committed at the time, or that defendant, voluntarily and of his own free will, entered into the difficulty, then there is no self-defense in the case, and the jury cannot acquit on that ground; and in such case it makes no difference how imminent the defendant's real or apparent peril may have become during the conflict. If the jury believe from the evidence that ——— had reasonable cause to believe that defendant was about to kill him or do him great bodily harm, then ——— had the right to arm and defend himself, and if the jury further find from the evidence that defendant, after being informed of the

[78] State v. Shelledy, 8 Iowa, 477.

[79] State v. Harper, 142 Mo. 478.

fact that ——— was afraid for his life and had armed himself, voluntarily went to meet ——— and by menacing conversation or conduct alarmed ——— and gave him reasonable cause to believe that he (defendant) was about to kill him (———) or do him great bodily harm, and in this way and by these means brought on the difficulty, then defendant was the aggressor, and there is no self-defense in this case.[80]

(1533) The court instructs that no man by his own lawless acts can create a necessity for acting in self-defense and thereupon killing the person with whom he seeks the difficulty, interpose the plea of self-defense. The plea of necessity is a shield only for those who are without fault in occasioning it and acting under it.[81]

As to right to kill in resistance of an unlawful arrest.

(1534) The court instructs that though the taking of life is not justifiable in order to prevent an unlawful arrest, yet one is justified in resisting such arrest by any degree of force not amounting to a taking of life and accordingly if the jury believe from the evidence that deceased sought unlawfully to arrest the defendant and the defendant opposed such attempt using no more force than was reasonably necessary, and deceased in attempting to effect such arrest, thereupon assaulted defendant in such a manner as to apparently threaten imminent danger of life or limb, defendant was justified in killing in self-defense.[82]

Accident.

(1535) The court instructs the jury that if they find from the evidence that the deceased and defendant were riding the same horse along the road, the defendant having a pistol in his hand, and that the deceased seized hold of the pistol in

[80] State v. Jones, 78 Mo. 273.

[81] The above is proper only when qualified in the charge by a recognition of the right to kill after an honest withdrawal from the struggle if there is evidence on which such hypothesis may be based.

[82] Noles v. State, 26 Ala. 31.

the hand of defendant and attempted to take the pistol from defendant by force, and in the scuffle which ensued, the pistol was accidentally discharged and produced the death of the deceased by accident, and without the fault or culpable negligence of the defendant, and without the defendant commencing or bringing on the difficulty with the deceased, the jury will find the defendant not guilty.[83]

Coercion by husband.

(1536) The court instructs the jury that in the eye of the law, a wife, who voluntarily and knowingly aids and assists her husband in the commission of a murder is equally guilty with him of the commission of the crime. A wife who kills another in the presence and under the constraint and coercion of her husband, the act of killing being the result of the husband's constraint and control of her will, and not the result of her own volition, is excusable for the act in the eye of the law and cannot be punished therefor. If the killing, however, is voluntary upon her part, and the result of the independent action of her own will, although done in the presence or at the suggestion of her husband she is held to the same measure of responsibility as any other person.[84]

CHAPTER LXXVII.

HUSBAND AND WIFE.

What constitutes wife's separate property, 1537-1539.
Agency of husband for wife, 1540-1542.
Title to rents, income and profits of wife's separate estate, 1543-1545.
Liability and charges on wife's separate estate, 1546, 1547.
Liability of separate estate for family necessaries, 1548, 1549.
Liability of husband for goods and necessaries furnished wife, 1550-1557.

What constitutes wife's separate property.

(1537) The court instructs the jury that a married wo-

[83] State v. Wisdom, 84 Mo. 177.
[84] State v. Hendricks, 32 Kan. 559.

man may hold real estate in her own right and may convey the same as if she were unmarried, and there attaches to her title all the usual incidentals and marks of ownership, and the court instructs the jury that if they believe from the evidence that the defendant took a conveyance of the dwelling house described in the declaration and resided in said dwelling house, then the jury are instructed that the presence of her husband in the same house as the head of the family cannot in the least detract from her full possession and ownership, and her title and possession are consistent with all the rights and duties that arise out of the marital relation.[1]

(1538) The court instructs the jury that if they believe from the evidence that plaintiff's husband acted as her agent in negotiating for the purchase of a farm described in the declaration, and that the husband took the contract of purchase in his own name, and that if the jury further believe from the evidence that plaintiff was present at the negotiations and heard the alleged false representations made to the husband, and finally received the deed from the defendant, paid the consideration, took possession and cultivated the land, then the jury are instructed that the farm so purchased by her husband as the plaintiff's agent was the wife's separate property.[2]

(1539) The court instructs the jury that where a husband takes the contract for the purchase of lands in his own name for his wife's benefit, making payments thereon with her money, the contract becomes equitably hers.[3]

Agency of husband for wife.

(1540) The court instructs the jury that the husband derives from the marital relation no authority over the wife's separate estate. If he acts as her agent, he cannot, without express authority deal with the trust for his own benefit, and

[1] Mygatt v. Coe, 152 N. Y. 457.
[2] Beardsley v. Duntley, 69 N. Y. 577.
[3] Hazewell v. Coursen, 36 Super. Ct. (4 J. & S.) 459.

the party with whom he so deals must, at his peril, ascertain the extent of his powers.[4]

(1541) The court instructs the jury that a married woman is competent to ratify and adopt unauthorized acts of her husband trading in her behalf.[5]

(1542) The court instructs the jury that though they may believe from the evidence that the plaintiff did not instruct or authorize her husband, ———, to have her licenses transferred to said husband, agent, or to have her business advertised as that of said husband, agent; yet if they further believe from the evidence that after her said husband had had her licenses so transferred and had so advertised the business, the plaintiff knew of her husband's action in those respects, and did not correct or repudiate them, then by her silence and acquiescence, after having knowledge of her husband's said acts, she ratified them and made them just as binding on her as if she had authorized them in advance.[6]

Title to rents, income and profits of wife's separate estate.

(1543) The court instructs the jury that the husband is entitled to the rents, income, or profits of the wife's statutory separate estate, and is not required to account to her, her heirs, or representatives, for them; and he may use them, or invest them for himself, if he chooses; or he may give them to his wife, in the same manner as he may give any other property. But if she claims them as a gift from her husband, she must show by proof that he had divested himself of the title, and invested it in her; he must abandon his right and title to it, and transfer it to her, by such words, acts, or writing, as will clearly show that the title had passed away from him to her.[7]

(1544) The court instructs the jury that if they believe,

[4] Hoffman v. Treadwell, 2 T. & C. 57.

[5] Wilcox & Gibbs S. M. Co. v. Elliott, 14 Hun, 16.

[6] Approved in Hoge & Hutchinson v. Turner, 96 Va. 624.

[7] Approved in Logwood v. Hussey, 60 Ala. 417.

from the evidence, that defendant acquired the property sued for, or any portion of it, with his own money or labor or by the rents, income, or profits of his wife's separate estate, and held it as his own, then it became his personal property, and is liable for his debts and contracts, and the sale of it to the plaintiff passed a good title, and entitles him to recover.[8]

(1545) The court instructs the jury that if you find from the evidence that ——— had made a gift of the rents, income, or profits of his wife's separate estate to her, in such manner as divested him of the right and title to them, and invested it in her, and that this gift was made before the debt to ——— was incurred, which was paid off for him by the plaintiff; then the said rents and profits so given became a part of her statutory separate estate, and could not be sold by her, unless for the payment of a debt for articles of comfort and support of the household, suitable to the degree and condition in life of the family, and for which the husband would be liable at common law; and if the jury find that the property sued for was bought with the proceeds of her separate estate received from her father, or with the rents and profits which her husband had given her, in the manner as before stated; then the sale of said property conveyed no title to the plaintiff, unless it was in payment of articles of comfort and support, as before stated.[9]

Liability and charges on wife's separate estate.

(1546) The court instructs the jury that if they believe from the evidence that the defendant owned in her own name the property described in the declaration, and that the husband of the defendant purchased of the plaintiff the merchandise described in the declaration to be used in the improvement of the separate estate of the defendant, and if the jury believe from the evidence that the purchase by the husband

[8] Approved in Logwood v. Hussey, 60 Ala. 417.
[9] Approved in Logwood v. Hussey, 60 Ala. 417.

was accompanied by fraudulent representations of the husband which induced the sale of the merchandise by the plaintiff, and that the merchandise so purchased was used in the improvement of the said separate property of the defendant, and if the jury further believe from the evidence that the said alleged fraudulent representations were made without the authority, sanction or knowledge of the plaintiff, then the jury are instructed that the defendant's separate estate is not liable for the price of the merchandise purchased by her husband.[10]

(1547) The court instructs the jury that a married woman is liable on a note given by herself and her husband for money borrowed by her, without regard to the purposes for which it was borrowed or used, and if the jury believe from the evidence that the defendant borrowed the money from the plaintiff as alleged in the declaration and that the defendant expended the money borrowed for the benefit of her husband, then the jury are instructed that the defendant is liable to repay the money so borrowed.[11]

Liability of separate estate for family necessaries.

(1548) The court instructs the jury that if they believe from the evidence, that the account which the defendants were owing to ———, and to secure which they had given ——— a mortgage on this property, was for articles of comfort and support of the household, suitable to the degree and condition of the family, and for which the husband would be liable at common law; and that the plaintiff at the request of defendants, paid said account for them, and, in consideration of the payment of said account, they executed to him the said bill of sale for the property sued for, then the contract was legal, and binding on the wife and on her statutory sepa-

[10] Corning v. Lewis, 36 How. Pr. 425, 54 Barb. 51.

[11] Martin v. Roberts, 30 Hun, 255.

rate estate, so far as conveyed by said bill of sale, and the plaintiff is entitled to recover.[12]

(1549) The court instructs the jury that, if they should find that the account due ——— was not for articles of comfort and support of the household, suitable to the degree and condition of the family, but that it was the personal debt of the husband, and payment of said debt of her husband was the consideration of the sale of her property, then her statutory separate estate was not liable for, and could not be sold to pay her husband's debt; and if any part of the property in the bill of sale was her statutory estate, said bill of sale was void as to it, and the plaintiff cannot recover it.[13]

Liability of husband for goods and necessaries furnished wife.

(1550) The court instructs the jury that the presumption of the wife's authority to pledge her husband's credit is negatived by their living apart, and in such case it is incumbent upon one who supplies articles to the wife to show not only that they were of the kind usually denominated necessaries, but that in consequence of the inadequacy of the husband's provision they were actually required for the wife's proper support in view of the husband's financial circumstances, her accustomed mode of living as his wife and her station in the community.[14]

(1551) The court instructs the jury that where a wife leaves her husband against his will and without justifiable cause, and goes to live with her parents and he is able and willing to maintain her with him and does not request her parents to board or care for her, nor promise to pay for it, the parents have no cause of action against the husband for her board or for other necessaries.[15]

(1552) The court instructs the jury that if they believe

[12] Approved in Logwood v. Hussey, 60 Ala. 417.
[13] Approved in Logwood v. Hussey, 60 Ala. 417.
[14] Bloomingdale v. Brinckerhoff, 2 Misc. 49, 49 State Rep. 142.
[15] Catlin v. Martin, 69 N. Y. 393.

from the evidence that the defendant's wife lived apart from the defendant by his consent without a separate maintenance being given to her, and that the defendant's wife purchased necessaries of the plaintiff while so living apart from the defendant, then defendant is liable for such necessaries, and what are necessaries must be ascertained from the circumstances of the defendant.[16]

(1553) The court instructs the jury that if the husband and wife part by consent, and he secures to her a separate maintenance suitable to his condition and circumstances in life, and pays it according to agreement, he is not answerable even for necessaries; and the general reputation of the separation will, in that case, be sufficient to protect the husband from liability to tradesmen selling goods to the wife.[17]

(1554) The court instructs the jury that if they believe from the evidence that the wife of defendant was treated by the defendant with such abusive cruelty that she was informed by her attending physician that it would not be safe for her to continue to live with the defendant, and if the jury further believe from the evidence that in consequence of such ill-treatment and in consequence of the advice so given, defendant's wife separated from him and lived apart from him, and if the jury further believe from the evidence that defendant's wife was justified in so living apart, then the jury may find the defendant liable for necessaries furnished to the wife by the plaintiff while she was so living apart from the defendant.[18]

(1555) The court instructs the jury that if they believe from the evidence that the defendant had provided a home for his wife, together with the necessaries of life suitable to defendant's condition and his financial circumstances, and that if the jury further believe from the evidence that defendant's

[16] Pomeroy v. Wells, 8 Paige, 406.
[17] Le Boutillier v. Fiske, 47 Hun, 323, 13 State Rep. 439.
[18] Wilson v. Bishop, 10 Ill. App. 588.

wife received good treatment from him, and notwithstanding this voluntarily and without sufficient cause deserted him and lived apart from him, then the defendant will not be liable for necessaries furnished to the wife by the plaintiff while so living apart from defendant.[19]

(1556) The court instructs the jury that tradesmen who sell goods to a wife upon her husband's account after notice from him not to do so, cannot recover from him therefor, unless they show a subsequent promise by him to pay or that the goods sold were necessary and suitable to her condition in life and that she was not otherwise provided for by the defendant.[20]

(1557) The court instructs the jury that to entitle the plaintiff to recover in this action, he must show that the defendant neglected to furnish necessaries to his wife.[21]

CHAPTER LXXVIII.

IMPLIED CONTRACTS.

Promise implied from conduct of parties, 1558-1560.
Between members of family to pay for board, services, etc., 1561, 1562.
Where special promise exists, 1563.

Promise implied from conduct of parties.

(1558) The court instructs the jury that a promise would not be implied from the fact that the plaintiff, with the defendant's knowledge, built the ——— and the defendant used it, but it might be implied from the conduct of the parties. If the jury find that the plaintiff undertook and completed the building of the ——— with the expectation that the defendant would pay him for it, and the defendant had reason to know that the plaintiff was so acting with that expectation and allowed him to so act without objection, then

[19] Bevier v. Galloway, 71 Ill. 517.

[20] Theriott v. Bagioli, 22 Super. Ct. (9 Bosw.) 578.

[21] Arnold v. Allen, 9 Daly, 198.

the jury might infer a promise on the part of the defendant to pay the plaintiff.[1]

(1559) The court instructs the jury that if they believe from the evidence in the case that the plaintiff rendered the services here sued for to the defendant, and that under all the circumstances of the case the services were of such a character as to lead to a reasonable belief that it was the understanding of the plaintiff and the defendant that pecuniary compensation should be made for them, then the jury may find an implied promise, and the plaintiff is entitled to recover what the jury may believe from the evidence in the case, such services were worth.[2]

(1560) The court instructs that if one sees another doing work for him beneficial in its nature, and has reasons to believe that the party doing the work supposes that he is doing the work for the party who receives the benefit thereof, and by his agent overlooks the work as it progresses, and does not interfere to forbid it, and does not act to undeceive the party so doing the work, the work being necessary and useful, and appropriates the work to his own use, he is liable on an implied promise to pay the value of the work, unless an express contract exists in the premises.[3]

Between members of family to pay for board, services, etc.

(1561) The court instructs that if the jury find from the evidence that the defendant is the mother of the plaintiff, and that, for the time mentioned in plaintiff's petition, the defendant lived with the plaintiff as one of his family, assisting in performing the ordinary duties of the household, and there was no express contract that the defendant was to pay for her board, and no understanding by either party that such board was to be paid for, then I charge that, as between

[1] Day v. Caton, 119 Mass. 513.
[2] Bouic v. Maught, 76 Md. 440.
[3] Chicago v. Great Eastern R. Co., 41 Ill. 108.

mother and son, there is no implied promise to pay for such board, and the plaintiff cannot recover in this case.[4]

(1562) The court instructs the jury that if the plaintiff, after she arrived at full age, continued to live with her father, as she had done previously, with no new duties or responsibilities assumed in the family by her, and was provided with necessaries, etc., as one of the family, she would not be entitled to recover for such services, unless there was an express understanding between her and her father, before these services were rendered, that she should receive such compensation; and if the note was given for such past services, and there was no such understanding existing between them, she cannot recover. But if the note was given for such past services, the fact that it was given, will raise a presumption that there had been a previous understanding or agreement between the plaintiff and her father that such compensation was to be made, and unless such presumption is overcome by evidence that no such understanding existed, the plaintiff will be entitled to recover.[5]

Where special promise exists.

(1563) The court instructs the jury that where there is a special contract founded upon a special promise, the law does not imply promises inconsistent with such special promise. The special promise excludes the idea of an implied one. Where the parties have seen fit to make their own terms and engagements, the law confines the parties to such terms.[6]

[4] Ayres v. Hull, 5 Kan. 419.
[5] Pitts' Adm'r v. Pitts, 21 Ind. 314.
[6] Noyes v. Loring, 55 Me. 408.

CHAPTER LXXIX.

INCOMPETENCY.

Competency to execute deed or to enter into contract, 1564-1567.
Insane delusions, 1568, 1569.
Intoxication, 1570.

Competency to execute deed or to enter into contract.

(1564) The court instructs the jury that in order to enable a man to make a deed of his property so as to pass the title, he must have sufficient mental capacity to understand the nature of the act in which he is engaged in its full extent and effect, and the capacity must exist at the time of the act performed; if it does not then exist the act would not be valid although the party might thereafter recover such capacity unless he acquiesced in it or ratified it afterwards.[1]

(1565) The court instructs the jury that the law cannot undertake to measure the validity of contracts by the greater or less strength of the understanding; but if the defendant was at the time of signing the notes so insane or destitute of reason as not to know the consequences of the act, then it is void. If he did know what he was doing, and understood the consequences of his contract, then he is liable, and your verdict should be for the plaintiffs in case you so find.[2]

(1566) The court instructs the jury that should you find from the evidence, under the instructions given, that defendant was so insane as to be incapable of making a contract, then the fact that the plaintiffs had no knowledge of such fact would be immaterial, except as showing that the plaintiffs did not exercise any undue influence or fraud upon him.[3]

(1567) The court instructs the jury that it does not require

[1] Approved in Wessell v. Rathjohn, 89 N. C. 377.
[2] Approved in Van Patton v. Beals, 46 Iowa, 62.
[3] Van Patton v. Beals, 46 Iowa, 62.

a high degree of mental power to make a binding agreement. One who has enough of mind and reason to clearly and fully understand the nature and consequences of his act in making a deed must be considered sane. One who has not this capacity is to be considered insane. If the defendant was insane, but had lucid intervals, he would during the lucid intervals have a right to make a contract, and if the jury believe from the evidence that the defendant was at times insane and that the contract here sued upon was made by defendant during lucid intervals, then the jury are instructed that such contract was binding upon the defendant.[4]

Insane delusions.

(1568) The court instructs the jury that if defendant, though knowing that he was making a deed and what its effect would be, yet was rendered entirely indifferent to property by an insane delusion that he was about to perish, or that others who would be affected injuriously were about to perish, so that he was incapacitated from a rational care for his own interest or theirs, then the deed may be avoided.[5]

(1569) The court instructs the jury that it is not every kind or degree of insanity that will relieve a party from the effect or consequences of his acts, but the insanity must either be general, or if special, have relation to the act from which the party seeks to be relieved; and in case the jury believe, from the evidence, that the insanity of ———, if existing at all, was on account of and confined to domestic troubles, and the real or supposed interference of his wife and friends, and that on the subject of business and property, and of his own condition, relations and necessities in respect thereof, he was of sound mind, then the jury will hold the contract valid, and will find for the plaintiff.[6]

[4] Norman v. Georgia Tran. & Trust Co., 92 Ga. 295.
[5] Approved in Bond v. Bond, 89 Mass. (7 Allen) 1.
[6] Emery v. Hoyt, 46 Ill. 258.

Intoxication.

(1570) The court instructs the jury that if they believe from the evidence that the plaintiff was intoxicated at the time of the making of the contract, which plaintiff seeks to rescind, but that plaintiff was not so intoxicated that he did not know what he was doing at the time of making the contract, and if the jury believe from the evidence that no person connected with the making of the contract aided in or procured the intoxication of plaintiff, then the jury are instructed that plaintiff cannot be relieved from the contract on the ground of intoxication.[7]

CHAPTER LXXX.

INFANTS.

Ratification after attainment of majority, 1571.

Ratification after attainment of majority.

(1571) The court instructs the jury that if they believe from the evidence that ———, after she became twenty-one years of age and before marriage, with knowledge that she, on account of infancy, was not liable to plaintiff for any purchases she may have made of him, expressly promised that she would pay for any portion of the articles mentioned in the bill of particulars, such a promise would be a ratification of the previous contract to the amount she promised to pay. If she promised to pay all, it would render her liable for all. If she promised to pay a part, or a certain sum, it would render her liable for such part, or for such certain sum; and if she, after such promise paid any money to plaintiff, it would go as a credit on the amount for which she made herself liable on the new promise.[1]

[7] Bates v. Ball, 72 Ill. 108.

[1] Approved in Ogborn v. Hoffman, 52 Ind. 439.

CHAPTER LXXXI.

INNS AND INNKEEPERS.

Holding out as innkeeper, 1572.
Necessity that business be regular business of party sought to be charged, 1573.
Innkeeper also boarding-house keeper, 1574.
Restaurants and eating houses, 1575.
Right to refuse entertainment to drunken persons, 1576.
Who are transients, 1577.
When relation ceases, 1578.
Removal of objectionable guest, 1579.
Property of guest for which innkeeper liable—Money, 1580, 1581.
Same—Goods, 1582.
Care required, 1583, 1584.
Custody of guest's property, 1585.
Loss caused by elements, 1586.
Duty to provide fire escapes, 1587.

Holding out as innkeeper.

(1572) The court instructs the jury that it is not necessary for them to find as a matter of fact that defendant exhibited any sign indicating his occupation to be that of an innkeeper, but it is sufficient if from the facts it appears that by any word or act or otherwise he held himself out to the general public as an innkeeper ready to receive guests.[1]

Necessity that business be regular business of party sought to be charged.

(1573) The court instructs the jury that in order to find that defendant was an innkeeper within the meaning of the law, the evidence must show that the keeping of an inn for the entertainment of the general public was the regular business of defendant. It will not be sufficient to find that he has sometimes furnished travelers with the accommodations of an inn, and on the other hand it is not incumbent on plain-

[1] Lyon v. Smith, 1 Morris (Iowa) 184; Kisten v. Hildebrand, 9 B. Mon. (Ky.) 74, 48 Am. Dec. 416; Dickerson v. Rogers, 4 Hump. (Tenn.) 179, 40 Am. Dec. 642; Pinkerton v. Woodward, 33 Cal. 557; Howth v. Franklin, 20 Tex. 798, 73 Am. Dec. 218.

tiff to prove that innkeeping was the sole and exclusive occupation of defendant, nor that he was not at the same time engaged in any other kind of business.[2]

Innkeeper also boarding-house keeper.

(1574) The court instructs the jury that though they find from the facts that defendant at the time in question and at various times received and entertained guests as permanent occupants of his house and upon a monthly charge for board and lodging, they are, nevertheless, not precluded from finding that with respect to plaintiff, defendant sustained the character of an innkeeper, if the facts further show that defendant kept and maintained a house for the entertainment of such of the general traveling public as might apply transiently for entertainment and shelter, and if they further find that defendant held himself out to the public as keeping and conducting such a place of entertainment, and also that plaintiff was so accommodated and entertained as a transient.[3]

Restaurants and eating houses.

(1575) The court instructs the jury that if they find from the evidence that defendant provided only a restaurant or eating house for the entertainment of the general public, and did not in connection therewith provide, or offer to provide, lodging for such of his guests as might apply, then the defendant is not an innkeeper and he cannot be held liable as such.[4]

[2] Kisten v. Hildebrand, 9 B. Mon. (Ky.) 72, 48 Am. Dec. 416; Lyon v. Smith, 1 Morris (Iowa) 184; State v. Matthews, 2 Dev. & B. L. 19 N. C. 424, also see Minor v. Staples, 71 Me. 316, where other business was conducted by the inn-keeper at the same time.

[3] Foster v. State, 84 Ala. 451; Bullock v. Adair, 63 Ill. App. 30; Lusk v. Belote, 22 Minn. 468; Cromwell v. Stephens, 2 Daly (N. Y.) 15; Lawrence v. Howard, 1 Utah, 23.

[4] Blum v. Southern Pullman Palace Car Company, 1 Flipp, U. S. 500; Shaeffer v. Willoughby, 163 Ill. 518, 54 Am. State Rep. 483; Carpenter v. Taylor, 1 Hilt. (N. Y.) 193; People v. Jones, 54 Barb. (N. Y.) 311; Montgomery v. Ladjing, 61 N. Y. Supp 840; Kelly v. Excise

Right to refuse entertainment to drunken persons.

(1576) The court instructs the jury that if they find from the evidence that plaintiff at the time when he requested entertainment at defendant's inn was intoxicated and disorderly in his conduct, then defendant was justified in refusing plaintiff entertainment in the inn, and is not liable in damages for so refusing.[5]

Who are transients.

(1577) The court instructs the jury that the law does not regard defendant as an innkeeper in his dealings with the plaintiff, unless the jury find from the evidence that plaintiff entered the house of defendant as a transient and for a more or less temporary stay, but in order to be a transient, it is not necessary that the evidence should show plaintiff to be a person coming from a distance.[6]

When relation ceases.

(1578) The court instructs the jury that if they find from the facts that on the day in question, plaintiff was a guest in defendant's inn, and that on that day plaintiff paid his bill and departed from the inn, the defendant thereupon ceased to sustain the character of innkeeper and was not liable as an innkeeper for the loss of plaintiff's baggage, which he permitted to remain in the inn, notwithstanding facts show that at the time of his departure plaintiff intended to return to the inn.[7]

Removal of objectionable guest.

(1579) The court instructs the jury that, having eliminated from the case the question as to whether this man went

Commissioners, 54 How. Pr. (N. Y.) 329; Kopper v. Willis, 9 Daly, 460.

[5] Hutchins v. Durham, 118 N. C. 457; McHugh v. Schlosser, 159 Pa. St. 480; 39 Am. St. Rep. 699.

[6] Walling v. Potter, 35 Conn. 183.

[7] Miller v. Peeples, 60 Mass. 819; 45 Am. Rep. 423.

of his own motion, after a request, or whether he was thrust out, and assuming that you have decided that he was thrust out (because under my instructions, unless you do find that you cannot go any further), then the question is, was this man thrust out as a drunken man who was persisting in disorderly conduct in that hotel, or was he a sick man whose annoyance, if his conduct was annoying, came from his sickness. And for that purpose it doesn't make any difference whether his sickness if he was actually sick, came from the abuse of liquor or from any other cause. Simply because a man has made himself sick with liquor, if he is a sick man, a hotel keeper cannot treat him as a willful wrongdoer; he must treat him as a sick man and regulate his conduct accordingly.[8]

Property of guest for which innkeeper liable—Money.

(1580) The court instructs the jury that if they find from the evidence in the cause, that the plaintiff was a guest of the defendant, as alleged in the declaration in this cause; that the trunk of the plaintiff was brought by him into the hotel of the defendant, while the plaintiff was a guest in said hotel; that the said trunk contained the bank-notes testified to by the plaintiff, and that said trunk and its contents were lost while so in said hotel, the plaintiff cannot recover for said bank-notes in this action, unless they shall also find that the said bank-notes were designed by the plaintiff for his use while on his journey or while a guest in said hotel, or unless they shall find that they were lost by the fraud or negligence of the defendant.[9]

(1581) The court instructs the jury that if they find the facts stated in the above prayer, and also find that the plaintiff had on his person at the time of his arrival at the hotel of defendant four or five hundred dollars in money of this

[8] Approved in McHugh v. Schlosser, 159 Pa. 480.

[9] Approved in Treiber v. Burrows, 27 Md. 130.

country, and that the money in the trunk was in Canada money, they may find that the money of this country was intended by him for use on his journey, and was sufficient for that purpose, and if they do so find, then the plaintiff cannot recover for the money in the trunk, unless they find it was lost by the fraud or negligence of the defendant.[10]

Same—Goods.

(1582) The court instructs the jury that the plaintiff left ——— and came to C., and brought the caddy or box of tea in controversy with him, and that said caddy or box had not been opened when he arrived at C., and that he intended renting a house and going to housekeeping in C., they may find that said tea was not intended for use while on his journey or while he was a guest in the hotel of the defendant (if they find he was such guest), and if they do so find, then the plaintiff cannot recover for said tea in this action, unless they also find that it was lost by the fraud or negligence of the defendant.[11]

Care required.

(1583) The court instructs the jury that if they find from the facts that the plaintiff had left defendant's inn intending not to return, but had left in the inn certain property in care of defendant, in that case the duty of the defendant was no longer to protect the goods absolutely, but was only to exercise slight care in respect to them, and defendant is not to be held liable, unless the jury find that he was guilty of gross negligence.[12]

(1584) The court instructs the jury that it is the duty of an innkeeper to keep the goods of his guests safely, night and day, so that no loss shall happen through his fault or

[10] Approved in Treiber v. Burrows, 27 Md. 130.

[11] Treiber v. Burrows, 27 Md. 130.

[12] Wear v. Gleason, 52 Ark. 64; 20 Am. St. Rep. 186; Murray v. Marshall, 9 Col. 482; 59 Am. Rep. 152; Whitemore v. Haroldson, 2 Lea (Tenn.) 312.

through that of his servants or others for whose presence in the inn the innkeeper is responsible, and if the facts show that the innkeeper was guilty of any breach of his duty in these respects, then the guests may recover for the loss sustained.

Custody of guest's property.

(1585) The court instructs the jury that unless they find from the evidence that at the time of the loss or injury the plaintiff's goods were in the custody of the defendant, as a keeper of a house for the entertainment of the traveling public, he would not be absolutely liable for injury to the goods; but it is not necessary that the jury find that the plaintiff's goods were strictly within the building used as the inn, nor that the goods were in the special keeping or physical custody of the defendant. It is sufficient if the facts show that the plaintiff's goods were in a place provided for that purpose, or that they were delivered to an authorized servant of the defendant.[13]

Loss caused by elements.

(1586) The court instructs the jury that if they find from the facts that the loss in question was due to the violence of the elements and the violence was unusual and such as no human foresight and the exercise of extraordinary care could have averted, then the defendant is not liable for any loss thereby resulting and the jury will find for defendant, or if the jury find from the evidence that the loss was caused by the destructive forces of the elements, and that the plaintiff himself was negligent in failing to exercise the proper precaution for the safety of his own property, in that case also they will find for the defendant.

Duty to provide fire escapes.

(1587) The court instructs the jury that it is by statute

[13] Piper v. Manny, 21 Wend. (N. Y.) 282;; Packard v. Northcraft, 2 Metc. (Ky.) 442; Norcross v. Norcross, 53 Me. 163.

made the duty of an innkeeper to provide safe and sufficient fire escapes upon the building occupied as an inn, and if the jury find from the facts that defendant did not equip his building with a sufficient number of sufficiently large fire escapes, or if they find that the fire escapes provided were not so placed upon the building as to be readily accessible to guests, the plaintiff may recover for any injury sustained by reason of defendant's negligence.

CHAPTER LXXXII.

INSANE PERSONS.

Liability for assault, 1588.

Liability for assault.

(1588) The court instructs the jury that if the act of ——— in assaulting the party, which is admitted to constitute a breach of the bond, was caused by mental disease or unsoundness which dethroned his reason and judgment with respect to that act,—which destroyed his power rationally to comprehend the nature and consequence of that act, and which overpowering his will irresistibly forced him to its commission, then he is not legally answerable therefor. But if you believe from all the evidence and circumstances that he was in possession of a rational intellect and sound mind, and allowed his passions to escape control, then though passion may for the time being have driven reason from her seat and usurped it, and have urged him with a force at the moment irresistible to desperate acts, he cannot claim for such acts the protection of insanity.[1]

[1] Approved in State v. Geddis, 42 Iowa, 264. Court holds that there is no distinction between civil and criminal causes.

CHAPTER LXXXIII.

INSURANCE.

I. General Principles.

Fraudulent representations by insured, 1589, 1590.
Honest disclosure of material facts, 1591-1593.
Distinction between representation and warranty, 1594.
Knowledge by insurance company of hazardous character of risk, 1595.
Authority of agent of insurance company, 1596.
Authority of agent of insurance company to receive notice of additional insurance, 1597.
Authority of agent to waive terms of policy, 1598.
Incorrect statement by insurer's agent—Responsibility of insurer therefor, 1599.

II. Life Insurance.

Insurable interest, 1600, 1601.
Warranties, 1602-1605.
Necessity that false statement should be fraudulent in order to avoid policy, 1606.
Materiality of misrepresentations or fraudulent statements by the insured, 1607-1609.
Same—Warranties, 1610.
Misrepresentations in application as to occupation of insured, 1611, 1612.
Misrepresentations by the insured as to his health, 1613, 1614.
Misrepresentations by applicant as to attendance of physician, 1615, 1616.
Misrepresentations by insured as to having consulted physicians, 1617.
Misrepresentations or false statements as to existence of consumption among relatives of applicant, 1618, 1619.
Misrepresentations by insured as to previous applications for insurance, 1620, 1621.
Misrepresentations by third persons, 1622.
Defense, to action on premium note, of misstatement by agent of insurance company, 1623.
Estoppel to insist upon forfeiture of policy, 1624, 1625.
Waiver of right to avoid policy for misrepresentations, 1626.
Notice and proof of death, 1627, 1628.
Same—Effect of refusal to pay policy, 1629, 1630.
Burden of proof, 1631.

III. Accident Insurance.

Representations by applicant as to occupation, 1632.
Unnecessary exposure to danger, 1633.
Notice and proof of injury, 1634.
Time within which action may be brought, 1635.

IV. Fire Insurance.

Mistake in description—Materiality, 1636.
Avoidance of policy because of misrepresentations and fraud of the insured, 1637-1641.
Misstatements made through fault or negligence of agent of insurer, 1642, 1643.
Same—Representations as to condition and occupancy of premises insured, 1644.
Materiality of representation as to keeping watchman, 1645.
Duty to disclose particular circumstances of peril, 1646.
Character of property—Generation of illuminating gas, 1647.
Avoidance of policy for misrepresentations by insured as to nature of title, 1648-1650.
Misrepresentations as to amount of incumbrance on property insured, 1651-1653.
Avoidance of policy because of overvaluation of property insured, 1654, 1655.
Violation of condition of policy as to occupancy of premises, 1656-1664.
Avoidance of policy because of increase of risk, 1665-1667.
Condition in policy against other insurance, 1668.
Avoidance of policy for failure to give notice of subsequent insurance, 1669.
Written consent to other insurance, 1670-1672.
Forfeiture of policy for violation of condition with regard to care of property, 1673.
Prohibited articles—Keeping gasoline on premises, 1674.
Forfeiture of policy for breach of agreement as to watchman, 1675.
Keeping books and papers in safe, 1676, 1677.
Defense that fire was caused by plaintiff, 1678.
Losses covered by policy, 1679.
Renewal of policy, 1680, 1681.

V. Waiver of Right to Avoid or Forfeit Fire Insurance Policy.

In general, 1682-1684.
Waiver of condition that watchman should be kept, 1685, 1686.
Waiver of right to avoid policy for misrepresentations in application, 1687.
Waiver of condition requiring consent of insurer to other insurance, 1688.

Same—Parol waiver, 1689.
Waiver by demanding proofs of loss, 1690, 1691.
Prohibition against operating factory at night—Estoppel to assert, 1692.

VI. Proofs of Loss by Fire.

Making of proofs by agent, 1693.
Time of making proofs of loss, 1694-1696.
Proof as to cause of loss, 1697.
Waiver of proof of loss, 1698, 1699.

VII. Marine Insurance.

Losses covered, 1700.
Abandonment, 1701-1706.

I. General Principles.

Fraudulent representations by insured.

(1589) Contracts of insurance may be avoided for false and fraudulent representations, or other fraud, by which they were induced, the same as other contracts; and such a defense requires no other elements or stronger evidence of fraud in cases of insurance than in any other.[1]

(1590) The court instructs the jury that the burden of proof to establish the materiality of the concealment or misrepresentation relied upon by the defendant as avoiding the policy here sued on as well as the alleged fraudulent intent, is upon the defendant.[2]

Honest disclosure of material facts.

(1591) The court instructs the jury that each party to a contract of insurance must communicate to the other in good faith all facts within his knowledge which are or which he believes to be material to the risk and which the other has not the means of ascertaining and as to which no warranty is made, and if specific information is required by the insurer on any point he deems material, it must be fully and correctly communicated.[3]

[1] Ryan v. Springfield Fire & Marine Ins. Co., 46 Wis. 671.
[2] Elliott, Insurance, § 118.
[3] Valton v. National Fund Life Assur. Co., 20 N. Y. 32; Norwich Fire Ins. Co. v. Boomer, 52 Ill. 442; Elliott, Insurance, § 83.

(1592) The court instructs the jury that neither party to a contract of insurance is required to communicate information except in answer to inquiries of matters which the other or his duly-authorized agent, knows, or matters of which, in the exercise of ordinary care, the other, or his duly-authorized agent, ought to know, and of which the applicant has no reason to believe he is ignorant, or of matters of which information is waived, or of matters which prove or tend to prove the existence of a risk excluded by a warranty, and which are not otherwise material, or of matters which relate to a risk excepted from the policy and not otherwise material or of mere matters of opinion or belief.[4]

(1593) The court instructs the jury that it is the duty of an applicant for insurance to answer fully and fairly all inquiries made with reference to the risk, but if such questions are not answered or are incompletely answered, and the insurer without further inquiry or investigation, issues a policy, he will be held to have waived his right to a more complete answer and to have elected to accept the risk with the information actually given.[5]

Distinction between representation and warranty.

(1594) The court instructs the jury that an express warranty in the law of insurance is a stipulation inserted in writing upon the face of the policy, on the literal truth or fulfillment of which the validity of the entire contract depends. The stipulation is considered to be on the face of the policy, although it may be written in the margin or transversely, or on a subjoined paper referred to in the policy. A representation, as distinguished from a warranty in the law of insurance, is "a verbal or written statement made by the assured to the underwriter, before the subscription of the policy, as to the existence of some fact or state of facts tending to induce the underwriter more readily to assume the risk by

[4] Elliott, Insurance, § 83.

[5] Phoenix Ins. Co. v. Raddin, 120 U. S. 183.

diminishing the estimate he would otherwise have formed of it." In the law of insurance a warranty is always a part of the contract,—a condition precedent upon the fulfillment of which its validity depends. A representation, on the other hand, is not a part of the contract, but is collateral to it. The essential difference between a warranty and a representation is that in the former it must be literally fulfilled, or there is no contract, the parties having stipulated that the subject of the warranty is material and closed all inquiry concerning it; while in the latter, if the representation prove to be untrue, still, if it is not material to the risk, the contract is not avoided.[6]

Knowledge by insurance company of hazardous character of risk.

(1595) The court instructs the jury that if an insurance company issue a policy upon a risk greater than an ordinary one, with a full knowledge of all the facts, it cannot escape the binding obligation of its contract by pleading such fact, for this would simply be allowing insurers to commit a deliberate fraud upon the insured.[7]

Authority of agent of insurance company.

(1596) The court instructs the jury that the same rules apply to insurance companies as apply to individuals, and a person who is clothed with power to act for them at all is treated as clothed with authority to bind them as to all matters within the scope of his real or apparent authority, and if the jury believe from the evidence that the agent who received plaintiff's application was charged with the duty of receiving and forwarding to the defendant applications for insurance, he must be deemed the agent of the defendant to

[6] Missouri, etc., Trust Co. v. German Nat. Bank, 77 Fed. 117; Mutual Ben. Life Ins. Co. v. Robison, 58 Fed. 723; Elliott, Insurance, § 102.

[7] Miller v. Mutual Ben. Life Ins. Co., 31 Iowa, 216.

receive a disclosure of facts, although the defendant privately instruct the agent to regard himself, in taking the application, as the agent of plaintiff.[8]

Authority of agent of insurance company to receive notice of additional insurance.

(1597) The court instructs the jury that whether M. was the agent of defendants, is a question of fact for them (the jury) to determine from the testimony; and, in aid of their investigation, they are instructed that an agent may be created by long acquiescence on the part of the principal, with knowledge of his acts as agent for said principal, as well as by express appointment; and that if, by express agreement, it is so arranged between parties that one shall be advertised as the agent, but that another shall actually do the business, and this third person does transact the business, and becomes known as the agent of the principals by transacting their business, then the said third person is their agent, and the principal is estopped from denying it as to those who have acquired rights against said principal because of the acts of said agent. A corporation cannot affirm an act of its agent in part, and disaffirm as to the residue. And the defendants herein are not to be allowed to avail themselves of the benefits of M.'s acts, wherein they inure to their benefit, and to ignore and disaffirm the acts of said M. when they may operate to their prejudice, provided he has acted within the scope of such agency. When there is no evidence of the written appointment of an agent, the fact and extent of his agency must be determined by what he testifies and did, and also by the acts of the company recognizing him. If either party must suffer from the mistake of an agent, it must be the party whose agent he is. If the plaintiffs procured the written permission of the agent to get other insurance, and the agent neglected to indorse the same on the policy, or inform

[8] Vanderhoef v. Agricultural Ins. Co. of Watertown, 46 Hun, 328, 12 State Rep. 341.

the company, then the plaintiffs cannot be affected by such neglect, if such agent had authority to give the permission, which is a question of fact for the jury.[9]

Authority of agent to waive terms of policy.

(1598) The court instructs the jury that on accepting the policy here sued on, the plaintiff was bound to inform himself of the terms and restrictions therein contained, and that the nature and extent or limitations on the authority of K., the agent of defendant, are to be found from all the evidence before you, and if the jury believe from the evidence that K. had the authority to act as a general agent of the defendant and that within the scope of such agency he was authorized to receive notice of additional insurance in other companies and that he did in fact receive such notice, then such notice would be notice to the defendant, but if from the evidence the jury believe that K.'s agency was only to procure risks and take premiums, and then deliver policies, his agency would in that event be a particular as distinguished from a general agency and in such case his authority would not extend to waiving any of the terms of the policy.[10]

Incorrect statement by insurer's agent—Responsibility of insurer therefor.

(1599) The court instructs the jury that if you find that the plaintiff was asked to and did sign the application in blank and the agent of the defendant filled it up on his own motion without knowledge of plaintiff as to what the answers were; or if you should find that the plaintiff made true and correct answers, but the agent, in writing the answers, for any reason, wrote incorrect answers, the plaintiff will not be responsible for the acts, mistakes or wrongs of such agent.[11]

[9] Approved in Insurance Co. v. Lyons, 38 Tex. 258.

[10] Insurance Co. v. Lyons, 38 Tex. 256-258.

[11] Approved in Hingston v. Aetna Ins. Co., 42 Iowa, 46.

II. Life Insurance.

Insurable interest.

(1600) The court instructs the jury that if you shall find, from the evidence, that the applications for insurance bearing date ——— and ———, offered in evidence, and purporting to have been made by J., were really, in substance, the application of P. for insurance on the life of his father, J., then you will inquire whether P. had an insurable interest on the life of his father which would support a policy for ———. In determining this question, you will inquire whether, from the evidence, it appears that, at the time of making such applications, said P. had any pecuniary interest, as creditor or otherwise, in the life of his father, or any reasonable expectation of profit or advantage which might be thwarted by his father's death, for the law will not enforce policies of insurance procured for mere gambling or wager purposes upon lives, on the continuance of which the assured cannot be deemed to have an insurable interest; and the mere relation of father and son, where both parties are of mature years, and live apart, in independent pecuniary circumstances, and mutually entirely independent of each other, and having no business relations with each other, does not create an insurable interest in the son on the life of the father; and, in deciding whether, in this case, P. had such an interest in his father's life as will support the insurance procured, you will take into account all the evidence as to the respective ages and situations in life of the father and son, and their business and social relations and all other facts which tend to show whether, as above defined, the son had an insurable interest in his father's life, at the date of his application aforesaid.[12]

(1601) The court instructs the jury further that though a party may have some insurable interest in the life of an-

12 Approved in Guardian Mut. Life Ins. Co. of N. Y. v. Hogan, 8(Ill. 35.

other, as creditor or otherwise, yet, if the amount of insurance procured upon such life appears palpably to be very largely in excess of any possible loss the assured can suffer from the death of the insured, then the presumption of a gambling or wager insurance arises, which calls upon the assured to show that such insurance was not procured as a mere cover for gambling, or a wager upon the life of the insured; and, in this case, if you believe, from the evidence, that the plaintiff had some interest of an insurable character, as already defined, in his father's life, at the date of his several applications for policies on his father's life and here sued on, yet, if you find, from the evidence, that the amount procured was vastly disproportionate in its excess to any probable loss which plaintiff might suffer from his father's death, such circumstance has a tendency to prove that the insurance was procured for mere purposes of speculation, and as a cover for gambling, and if, from the evidence, you shall find that such was the fact, then the plaintiff can not recover in this action.[13]

Warranties.

(1602) The court instructs the jury that the statements in the application which are made a part of the policy, are warranties of the truth of the statements therein contained, and if they believe from the evidence that any of said statements are untrue in any respect, whether material or immaterial, they avoid the policy, and the plaintiff cannot recover. The truth of the statements contained in the application which are made part of the policy is the basis of the contract between the parties to this controversy, and if they believe from the evidence that any of said statements in said application are untrue then they must find for the defendant.[14]

(1603) If the jury believe from the evidence that said C. made a written application to the defendant for a policy of

[13] Approved in Guardian Mut. Life Ins. Co. of N. Y. v. Hogan, 80 Ill. 35.

[14] Union Cent. Life Ins. Co. v. Pollard, 94 Va. 146.

insurance for the benefit of the plaintiff, and that said application contains a condition in which said C. uses the following language: "I also agree that all the foregoing statements and answers, as well as those I make to the company's medical examiner in continuation of this application are by me warranted to be true, and are offered to the company as a consideration of the contract, which I hereby agree to accept as issued by the company in conformity with this application, and which shall not take effect until the first premium shall have been paid, and the policy shall have been delivered, during my continuance in good health," then the court instructs the jury that every part of said clause is material in this case, and that the words, "which I hereby agree to accept as issued by the company in conformity with this application, and which shall not take effect until the first premium shall have been paid, and the policy shall have been delivered, during my continuance in good health," create a condition precedent, which must be performed before the plaintiff can recover in this action.[15]

(1604) The jury are further instructed that E. stipulated in his application, that his answers and each of them to the said several interrogatories propounded to him by the medical examiner, were full, true, and complete, and a failure on his part to make a full, complete, and true answer to any of the said questions so propounded avoids the policy and there can be no recovery.[16]

(1605) All the questions and answers are to be considered as of the day of the application, none of them so far as they are referred to in the evidence have reference to any future condition or state after that date. And all the evidence which has been introduced, which has reference to any condition or state of E. subsequent to that date, is to be con-

[15] Oliver v. Mutual Life Ins. Co. of New York, 97 Va. 134.
[16] Home Life Ins. Co. v. Sibert, 96 Va. 403.

sidered only in so far as it throws light upon his condition, as of, or previous to, that day.[17]

Necessity that false statement should be fraudulent in order to avoid policy.

(1606) The answer to question No. ——, viz., "Are you in perfect health, so far as you know and believe?" to which the answer is recorded "Yes," does not avoid the policy unless the answer was not only false, but designedly false. Questions which are general and indefinite in their terms are interpreted according to the usual and ordinary significance of the terms and words used, and the jury must interpret whether the answer is full, true, and complete in such reasonable information as the question naturally called for. To constitute an answer not full or not complete, E. must have suppressed some fact, which the question reasonably called for, and which fact was material to the risk.[18] If the jury believe that each of the answers to the said several interrogatories were true, full, and complete, and the answer to No. —— was not fraudulently made, then they should find for the plaintiff the amount of the insurance, with interest from the day the same became payable, and if, on the other hand, the answer to any of the interrogatories was not true, full, and complete, then the jury must find for the defendant, the answer to No. —— being excepted, which, as stated above, to avoid the policy must be not only false, but fraudulent.

Materiality of misrepresentations or fraudulent statements by the insured.

(1607) The court instructs the jury that if they believe from the evidence that any of the answers made by Mr. ——— in his application for this insurance were untrue in a material particular, that the defendant acted upon these answers, believing them to be true, that the company did not

[17] Home Life Ins. Co. v. Sibert, 96 Va. 403.
[18] Home Life Ins. Co. v. Sibert, 96 Va. 403.

know they were untrue, and would not have issued the policy if it had not relied upon such answers, then there can be no recovery upon the policy, and your verdict must be for the defendant.[19]

(1608) The court instructs the jury that an untrue or fraudulent statement, or denial, made by the applicant, of a fact material to the risk, to induce the issuance of a policy, will prevent the policy from taking effect as a valid contract, unless the insurer has in some way waived or estopped himself from relying upon such misstatement to avoid the policy. If you find that ——— made an untrue or fraudulent statement of a fact material to the risk in the application for the policy, then you should find for the defendant, unless you further find that the defendant was informed of and knew the truth in regard to such fact, and after knowing such fact fully, received the application, the premium money and notes, and issued the policy, in which case you should find for the plaintiff.[20]

(1609) The court instructs the jury that fraudulent representations made by an applicant for life insurance on a point which is material in the judgment of the insurer, and induces him to take the risk, will avoid the policy, although it is not material to the risk. It is not necessary that the misrepresentation should affect the nature of the risk. It is enough that it induced a confidence without which the insurer would not have acted and if the jury believe from the evidence that the deceased on making application for life insurance to the defendant represented that the applicant was the moneyed man of the firm of which he was a member, and this representation induced the defendant to issue the policy here sued on, then such representation, if the jury find it to be false, avoids the policy and plaintiff cannot recover.[21]

[19] Union Cent. Life Ins. Co. v. Pollard, 94 Va. 146.
[20] Miller v. Mutual Ben. Life Ins. Co., 31 Iowa, 216.
[21] Valton v. National Fund Life Assur. Co., 20 N. Y. 32.

Same—Warranties.

(1610) The court instructs the jury that misrepresentation, to be such as to avoid a life policy, must, in the absence of fraud, be in respect to some circumstance or fact material to the contract, by which the insurer was induced to undertake the risk, but that a warranty must be literally true, whether the fact warranted be material or not. In the case of a warranty, the question, how far the fact was or was not material, is not to be considered. Knowledge on the part of the agent of the falsity of a warranty will not relieve the assured from the forfeiture incurred by reason of a false warranty.[22]

Defense, to action on premium note, of misstatement by agent of pation of insured.

(1611) The court instructs the jury that the truth of all the answers to the application by deceased for insurance was warranted by the policy here sued on, and if the jury believe from the evidence that the application by deceased for a policy in the defendant company contained a question as to whether the deceased was engaged in or connected with the manufacture or sale of any beer, wine or other intoxicating liquors and that the deceased answered "No" to this question, and that deceased had been engaged for years in the business of keeping a hotel and that during that period he regularly and systematically sold wines and liquors in bottles of various sizes, bearing the name of his hotel blown into the glass, to such of his guests as desired them, and if the jury believe from the evidence that he kept a wine or liquor room in which was stored a large supply of wines and liquors and carried both a state and federal license which authorized the deceased to carry on the business of selling beer, wine and liquors at retail, to be drunk upon his premises, then the jury are instructed that the answer of deceased to the above-recited question was false, though the jury

[22] Barteau v. Phoenix Mut. Life Ins. Co. of Hartford, 67 N. Y. 595.

may further believe from the evidence t' ' deceased kept no bar and did not sell to persons who were not his guests and the jury are instructed that the falsity of such answer forfeits the policy here sued on and that plaintiff cannot recover.[23]

(1612) The court instructs the jury that if they believe from the evidence that deceased on applying for the policy here sued on in answer to a question stated that he had never directly or indirectly been engaged in the sale of wines or liquors and that deceased during a period of ten years, ending five years before the application was made, had been engaged in business as a druggist and that in connection with such business he had sold considerable quantities of liquors, then if the jury believe from the evidence that the statement of deceased was made willfully and with intent to deceive, and was relied on and did deceive, the policy is forfeited, though such statement was immaterial, but if the jury believe from the evidence that the statement was made incidentally, without reckless intent, and without having in mind the distinction between the traffic in liquors as a traffic by itself and as one incidental to the druggist's business, and that the statement is not material to the risk, then the policy is not forfeited.[24]

Misrepresentations by the insured as to his health.

(1613) The court instructs the jury that the policy here sued on warrants that the applicant for insurance shall answer the questions put to him in the application fully and truly, and if the jury believe from the evidence that deceased did not answer truly a question propounded to him concerning his health, then the jury are instructed that such answer forfeits the policy here sued on and plaintiff cannot recover, though the jury may further believe that the deceased answered the question in good faith.[25]

[23] Dwight v. Germania Life Ins. Co., 103 N. Y. 341.
[24] Hadley v. Provident Sav. Life Assur. Soc., 90 Fed. 390.
[25] Mayer v. Equitable Reserve Fund Life Ass'n, 49 Hun, 366.

(1614) The court instructs the jury that by the policy in this case here sued on, the statements in the application are made warranties, and that one of the statements in the application is that deceased was in good health at the time of the application for the policy of life insurance, and the application further states that the policy should only be delivered in the lifetime of the insured and when he was in good health, and if the jury believe from the evidence that the insured was ill with typhoid fever at the time of making answer to the questions and that he stated that he was in good health and that on the day on which deceased died of such fever, the agent of defendant called upon the employer of the deceased and advised him to pay the premium, though the agent was informed that deceased was sick at home, and the employer paid the premium, the jury are instructed that this would not make out a waiver of the stipulation, even if the agent had authority to waive such stipulation.[26]

Misrepresentations by applicant for life insurance as to attendance of physician.

(1615) The court instructs the jury that the policy here sued on made the answers in the application by the insured for a policy of insurance in defendant company, warranties, and if the jury believe from the evidence that the deceased in answer to a question in the printed application stated that he had not been attended by a physician, nor consulted one for two years, and that the applicant had been attended by a physician within two months before making the application, who treated the applicant for ———, then the jury are instructed that a breach of the warranty is established which forfeits the policy here sued on and that plaintiff cannot recover although the jury may further believe that the applicant was not in fact afflicted with the disease for which he was treated.[27]

[26] Maloney v. Northwestern Masonic Aid Ass'n, 8 App. Div. 575.
[27] Roche v. Supreme Lodge, Knights of Honor, 21 App. Div. 599.

(1616) The court instructs the jury that although representations by the person insured are not necessarily warranties, as in the case of marine fire insurance, yet the policy would be avoided by an intentional concealment or misrepresentation of any material fact, and if the jury believe from the evidence that the deceased on applying for the policy of insurance in defendant company here sued upon represented that he had no regular doctor and that there was no physician to whom he could refer for information and if the jury believe from the evidence that the deceased had been occasionally treated for serious illness by a certain physician and that he had been examined by the medical adviser of another insurance company, and had been rejected, then the jury are instructed that this would constitute a fraudulent concealment which would forfeit the policy here sued on.[28]

Misrepresentations by insured as to having consulted physicians.

(1617) The court instructs the jury that the application made by the deceased for the policy here sued on required the plaintiff to give the name of his family physician, for what the physician had treated him and whether he had consulted any other physician, and the policy warranted that the answers should be in full, and the court instructs the jury that if they believe from the evidence that the deceased stated that he had no family physician and gave the name of a physician as having treated him, and he had consulted several physicians, then the jury are instructed that the failure of the deceased to state the name of the other physicians, was not a breach of the warranty, as deceased had the right to construe the question in the application as not requiring him to state the names of all the physicians consulted by him.[29]

[28] Horn v. Amicable Mut. Life Ins. Co., 64 Barb. 81.

[29] Billings v. Metropolitan Life Ins. Co., 41 Atl. 516.

Misrepresentations or false statements as to existence of consumption among relatives of applicant.

(1618) The court instructs that ——— has brought suit against ——— Insurance Company to recover $—— on a policy issued to ———, which the evidence indicates was for her benefit and on which she paid the dues, premiums, assessments or whatever they may be. The policy is dated the ——— day of ———, 19—, and insures the life of ——— for $—— under the conditions therein stated. ——— died on the ——— day of ———, 19—, and it is admitted that the proofs of death were made. The important defense, and one that counsel for defendant has argued to the jury, is this, that misrepresentations were made in the application, the leading one being that none of the relatives of the applicant had died of consumption, whereas the proofs of death and the evidence indicate that the father and mother had each died of consumption, one at thirty-eight and the other at thirty-nine years of age, their ages at death being given in the application as seventy and seventy-five. The policy provides that the warranties and agreement in the printed and written application are to be made part of the contract and are to be treated as warranties. We instruct you that they are not in this case to be considered because the act of assembly provides as follows:

"All life and fire insurance policies upon the lives or property of persons within this commonwealth shall contain, or have attached to said policies, correct copies of the application as signed by the applicant; and unless so attached and accompanying the policy, no such application shall be received in evidence in any controversy between the parties to or interested in the said policy nor shall such application be considered a part of the policy or contract between such parties."

This application was not attached to nor is it part of the policy; and therefore, even though it is in evidence as we

construe the law, it is not a warranty, and there is the more reason for it in this case because the beneficiary—the one from whom the premiums were taken, and for whose use the policy is made—did not sign the application. There is no evidence that she ever heard or read or that she saw or knew what it contained. The application is produced by the company today, it having been in their possession. But nevertheless, this is not without its significance in this case. A policy obtained by fraud or knowingly misrepresenting some important fact would be void as to the company if they did not take money on account of it after they knew of the fraud or did not do something to estop them from setting it up.

Now if you find that the parents of this man died, at this early age, of consumption, and that was an important essential and material fact, the misrepresentation of which resulted in the obtaining of this policy, and the company was deceived thereby without fault of its own, and that it did not receive money on the policy after it knew the facts, then it would avoid the policy whether such misrepresentation was made by the deceased or by the plaintiff, and the plaintiff cannot recover.[30]

(1619) The court instructs the jury that they cannot say as a matter of law in the present state of medical science, that the statement that none of the applicant's relatives had died of consumption, though the proofs show that the father and mother of the applicant died of consumption at about the age of forty years, is a material misrepresentation. By proper care, consumption may be prevented and people descending from consumptive parents may reasonably be expected to live out a fair period of life. Whether the misrepresentation is material is for the jury to say, and in determining the question, they are simply to take into consideration the fact that in the application the defendant asked these questions concerning the existence of the disease of consump-

[30] Approved in Weber v. Metropolitan Life Ins. Co., 172 Pa. 111.

tion, that in the policy the defendant speaks of consumption and provides against paying the full amount of the policy, if death occurs from that cause within a year. It seems to the court that the misrepresentation was concerning a material fact; still that is for the jury to say.[31]

Misrepresentations by insured as to previous applications for insurance.

(1620) The court instructs the jury that if they believe from the evidence that the deceased on applying for the policy here sued on stated in answer to a question in the application that he had never made application for insurance to any company, association or society, on which a policy had not been issued, and that some years before the issuance of the policy here sued on deceased applied for membership in another company than the defendant, and that such company was a secret, social and beneficial order in which some kind of benefit was paid and that the application of deceased was reported on favorably by the examining physician but was rejected by the chief medical examiner on account of a fact shown by the examination, and that such fact in itself did not constitute good ground for rejection, and never affected the health of the deceased and did not exist at the time of the issuance of the policy in suit and if the jury believe from the evidence that the applicant was never informed that he had been rejected on account of his health, then the jury are instructed that the above-recited answer of the deceased to the question concerning previous applications for insurance must be regarded as immaterial to the risk and not ground for forfeiture of the policy.[32]

(1621) The court instructs the jury that by the policy here sued on the answers to the questions in the printed application for the policy were made a part of the contract and if

[31] Weber v. Metropolitan Life Ins. Co., 172 Pa. 111.

[32] Fidelity Mut. Life Ass'n of Philadelphia, Pa., v. Miller, 92 Fed. 63.

false, invalidated the contract, and that if the jury believe from the evidence that the application contained a question as to whether the deceased had made any other applications for insurance and what were the result of such applications and that the deceased answered that he had made application for other insurance and that he had never been rejected, then if the jury believe from the evidence that the deceased had previously presented a written application to the agent of another insurance company and that the medical examiner of such other insurance company stated that the deceased was not insurable and that thereupon the application to such other insurance company was destroyed, the jury are instructed that the answer above recited by the deceased to the question as to his application to other insurance companies, is false and that the policy here sued on is forfeited.[33]

Misrepresentations by third persons.

(1622) The court instructs the jury that the defendant avers that there were certain untrue and fraudulent statements contained in the application by A., and insists that only his statements in regard to his health and habits should be inquired into. But, as the contract was based upon the statements of the insured's physician and friends as well as his own, the statements of all three should be considered in determining the question of fraud.[34]

Defense, to action on premium note, of mistatement by agent of insurance company.

(1623) The court instructs the jury that you are instructed as a matter of law that if R., in answering the question as to what his occupation was, said to the agent of the plaintiff, that he was engaged in the yards of ——— Railroad Company as a switchman, making up trains and doing general work about the yards there in connection with trains, and V.

[33] Edington v. Aetna Life Ins. Co., 77 N. Y. 564.
[34] Miller v. Mutual Ben. Life Ins. Co., 31 Iowa, 216.

put in his application, which was the foundation for the issuing of the policy, the statement that he did not go near the cars, or do switching, then, that would be such a misstatement or fraud practiced upon the insured here, so that he would be entitled to have the policy and notes set aside. You will take all these circumstances into consideration and if he did know it, but afterwards acted on the policy as if it was in force, and he was bound by it and the company was bound by it, then he could not assert the defense which he is seeking to assert here or, if V., the agent of plaintiff, put into this application, the language as used by the defendant in stating what his occupation was, as he claims that he did, why then, of course R. would not have the right to assert that by way of defense to this note, because, if there was any fraud then, it would be fraud of the defendant and not the fraud of the company or its agent.[35]

Estoppel to insist upon forfeiture of policy.

(1624) The court instructs the jury that where an agent of an insurance company having real or apparent authority to receive an application for insurance is truly informed by the assured of the facts relating to the risk, but incorrectly states them in a written application for insurance prepared by him, and without the knowledge or consent of the assured, the insurance company is estopped from insisting upon a forfeiture of the policy issued upon such application on account of such statement.[36]

(1625) The court instructs the jury that where an agent of an insurance company having real or apparent authority to receive an application for insurance is truly informed by the assured of the facts relating to the risk, but incorrectly states them in a written application for insurance prepared by him, and without the knowledge or consent of the assured, the in-

[35] Approved in Michigan Mut. Life Ins. Co. v. Reed, 84 Mich. 524.
[36] Royal Neighbors of America v. Boman, 75 Ill. App. 566.

surance company is estopped from insisting upon a forfeiture of the policy issued upon such application on account of such statement, and if the jury believe from the evidence that the agent of the defendant who solicited the application of the deceased knew that the deceased was foreman of a switch crew in a railroad yard and that the agent had been with the deceased when he was doing his work and that in making out the application, the agent wrote in the blank furnished by him in answer to the question as to what the occupation of deceased was "Foreman of R. R. yards," and if the jury believe from the evidence that the policy here sued on was issued on such application so filled in by the agent and signed by the insured, then if the jury believe from the evidence that the deceased correctly stated his occupation to the agent, the jury are instructed that the deceased had the right to rely upon the statement as written by the agent as sufficiently accurate and that the inaccurate answer did not avoid the policy.[37]

Waiver of right to avoid policy for misrepresentations.

(1626) The court instructs the jury that the statements made by the applicant for the life insurance policy here sued on were by the terms of the application made the sole basis of the contract, and that the policy provided that no verbal statement by whomsoever made should modify the contract, and if the jury believe from the evidence that a statement was made by the applicant in answer to questions in the printed application, that he did not use spirits, wines or malt liquors, except two or three glasses of beer a day, and that he was a temperate man, and that this answer was false and if the jury believe further from the evidence that the applicant made true statements to the agent and that the agent wrote them down incorrectly, then the jury are instructed that the defendant was not bound by any verbal statements made by

[37] **Triple Link Mut. Indemnity Ass'n v. Williams, 26 So. 19.**

the applicant to the agent which did not appear in the application.[38]

Notice and proof of death.

(1627) The court instructs the jury that a substantial compliance with the conditions of the policy of insurance as to the manner and mode of giving notice of the death of the insured to the defendant is all that can be required on the part of the plaintiff in giving such notice.[39]

(1628) The court instructs the jury that under the policy of insurance in this case no particular form of notice was required; and that if they believe from the evidence that the letter written by plaintiff on the ———, was intended by the plaintiff to give the required notice to the company, and that upon receipt of said letter the company sent its agent to the city of ———, the place of the death of the insured, for the purpose of investigating the facts and circumstances connected with the said death, and that such investigation was made immediately thereafter, then no further proof could be required in this case before the suit was brought.[40]

Same—Effect of refusal to pay policy.

(1629) The court instructs the jury that if they believe from the evidence that the plaintiff wrote to the defendant the letter dated ———, giving notice of the death of B. H., the insured, and that after receipt of said letter, and in consequence thereof, the company sent its agent, O., to inquire and ascertain all the facts in reference to said death, and that the said agent came to ———, the place of said death, and investigated the facts as to the death and the cause thereof, and that after making such investigation the said agent, upon the sole ground of ——— at the time of the accident, told the plaintiff "that he had no case, and that in his opinion the

[38] Hamilton v. Fidelity Mut. Life Ass'n, 27 App. Div. 480, 50 N. Y. Supp. 526.

[39] Approved in Travelers' Ins. Co. v. Harvey, 82 Va. 949.

[40] Approved in Travelers' Ins. Co. v. Harvey, 82 Va. 949.

company ought not to pay, and would not pay, the policy," and that such denial of liability was not because the formal proofs of the death had not been given, then it was not incumbent on the plaintiff to furnish any further proof of said death, and the plaintiff had the right at any time thereafter to institute this suit.[41]

(1630) The court instructs the jury that if they believe from the evidence that O., the agent of the defendant, had no authority to refuse the payment of the policy to the plaintiff, and that the plaintiff was informed that he had no such authority and that the said O. did no act or made no statement which induced the plaintiff to believe that he had such authority, then no expression of opinion on the part of said O. that he did not think the company would pay said policy would be binding on the company or amount to a refusal on its part to pay said policy.[42]

Burden of proof.

(1631) The court instructs the jury that the burden of proof is on the plaintiff to prove the death of E.; that the company received proof of his death, and any other prerequisite required by the policy before payment of the insurance money, or that such prerequisite has been waived by the defendant, but the burden of proof is on the defendant to show that the policy is avoided by virtue of the failure of E. to answer the questions propounded to him by the medical examiner in accordance with the stipulations of his application.[43]

III. Accident Insurance.

Representations by applicant as to occupation.

(1632) The court instructs the jury that if they believe from the evidence that the plaintiff on applying for an accident insurance policy in the defendant company represented

[41] Approved in Travelers' Ins. Co. v. Harvey, 82 Va. 949.
[42] Approved in Travelers' Ins. Co. v. Harvey, 82 Va. 949.
[43] Home Life Ins. Co. v. Sibert, 96 Va. 403.

that his occupation was that of switchman, such representation did not require plaintiff to remain in such occupation as switchman, the policy here sued on containing no provision against change of occupation.[44]

Unnecessary exposure to danger.

(1633) The court instructs the jury, that if they believe from the evidence in this case, that the plaintiff suffered the injury in question through violent, external and accidental means, which were not the result of any unnecessary exposure to dangers on his part, then you will find the issues for the plaintiff; but if you should believe from the evidence that said injury was the result of an unnecessary exposure of himself to danger (not in any attempt to save human life), then your verdict should be for the defendant.[45]

Notice and proof of injury.

(1634) The court instructs the jury that one of the conditions of the policy is that "immediate notice of any accidental injury or accidental death for which claim is to be made under this contract, shall be given in writing to the secretary of the company at ———, with full particulars of the accident and injury, and unless affirmative and positive proof of death or injury and that the same resulted from bodily injuries covered by this contract, shall be furnished to the company within six months of the happening of such accident, in case of such injuries resulting fatally, then all claims based thereon shall be forfeited to the company; and the court instructs the jury that the preliminary proofs of claim are conditions precedent; what constitutes them is determined by the contract. The proofs being in writing, their sufficiency is a question for the court, and the court instructs that the proofs made by the plaintiff in this case are a substantial compliance with the requirements and conditions of the policy.[46]

[44] Provident Life Ins. Co. of Chicago v. Fennell, 49 Ill. 180.

[45] Approved in Travelers' Preferred Acc. Ass'n v. Stone, 50 Ill. App. 222.

[46] Approved in Braymer v. Commercial Mut. Acc. Co. v. 199 Pa. 259.

Time within which action may be brought.

(1635) The court instructs the jury that if they believe from the evidence that O. was a general agent of the defendant for the purpose of effecting policies of insurance and adjusting losses, and if they further believe from the evidence that the said agent declined to pay the policy here sued on upon the sole ground that the insured was intoxicated at the time of the accident, or that he so acted as to warrant the plaintiff in believing that the payment by the company would be resisted upon that ground, then the plaintiff has the right to institute this suit although ninety days had not expired from the death of the insured, as required by the policy.[47]

IV. Fire Insurance.

Mistake in description—Materiality.

(1636) The court instructs the jury that the plaintiff claims that the insurance effected by him was applied for on (block 609) in the town of ———, and written down by mistake of the agent of the defendant as (block 309). The defendant claims the error to have been made by the plaintiff. If the jury believe from the evidence, that the plaintiff inaccurately stated the block either by design or accident, and that such error was material, and that the company would not have issued the insurance if the block had been correctly stated, and that the company did not subsequently, during the continuance of the policy and before the fire, know correctly the actual situation of the property of plaintiff insured, with reference to other property insured by the company, the jury may find for the defendant. But if the jury believe, from the evidence, that the error in the number of the block was in fact immaterial, or that the mistake was caused by the agent of the company, or that subsequently to the issuance of the policy, and before the fire occurred, the president or agent of the company became aware of the loca-

[47] Approved in Travelers' Ins. Co. v. Harvey, 82 Va. 949.

tion of plaintiff's property, with reference to other property insured by the company, and took no step to cancel said policy, the jury must find for the plaintiff. The jury must judge, from the evidence, how far the mistake of the number of the block was material to the defendant.[48]

Avoidance of policy because of misrepresentations and fraud of the insured.

(1637) The court instructs the jury that if they believe from the evidence that the plaintiff in his application for insurance, made a false or untrue statement as to the value or ownership of the property insured, as an inducement to the company to enter into the contract of insurance, and that the company relied upon such statement and was induced thereby to enter into such contract of insurance, here sued on, then such contract is voidable, by its terms and conditions, by the defendant, and cannot be enforced against it, and the verdict should be for the defendant, unless the jury further believe from the evidence that defendant, after it had full knowledge of such representations, waived its right to a forfeiture of the policy on the ground of such false statements.[49]

(1638) Representations of existing facts in respect to the property insured may be false and fraudulent and material in praesenti, and avoid the policy of insurance, although not in writing, nor intended nor construed as warranties, and having no reference to future conditions of the property so as to be continuing representations or promissory warranties.[50]

(1639) The court instructs the jury that by one of the conditions of the policy herein sued upon, the applicant must state whether the property covered by the policy was incumbered, and if so to what amount and if the applicant has any less estate than a fee, the nature of such estate, and the court

[48] Approved in Home Ins. & Banking Co. of Texas v. Lewis, 48 Tex. 622.

[49] German Fire Ins. Co. of Peoria v. Grunert, 112 Ill. 68.

[50] Ryan v. Springfield Fire & Marine Ins. Co., 46 Wis. 671.

instructs the jury that if they believe from the evidence that the agent of the defendant filled up the printed application furnished to agents for the purpose of making contracts of insurance and that in such printed application no questions were asked as to incumbrances, and plaintiff was not inquired of as to the particular nature of his title, and on the face of such application so filled out by defendant's agent, defendant issued the policy here sued on, then they are instructed that the above-recited condition of the policy could not be relied upon by defendant to avoid the policy.[51]

(1640) The court instructs the jury that the plaintiff in this suit is bound by the terms and conditions of the policy of insurance introduced in evidence, so far as the same relate to him, and that by the terms of the policy the application of the plaintiff for insurance, which has been introduced in evidence, became, by the terms and conditions of the policy, a part of the policy and contract of insurance and warranty by the plaintiff that any false overvaluation of property, or any misrepresentation whatever in said written application or otherwise, should render the policy void and of no effect, and if you believe from the evidence that in said application the plaintiff falsely represented the value of the property covered by the policy, with intent to deceive defendant and did thereby deceive defendant, then you will find a verdict for the defendant, unless you further believe from the evidence, under the law, as explained in these instructions, that defendant has waived its right to have the policy forfeited on that ground.[52]

(1641) The court instructs the jury that it is no defense to a recovery in the suit that the plaintiffs, or any of them, either, at the time of obtaining the policy sued on, represented the value of the buildings on said premises greater than their

[51] Dohn v. Farmers' Joint-Stock Ins. Co., 5 Lans. 275.

[52] Approved in German Fire Ins. Co. of Peoria v. Grunert, 112 Ill. 68. It would be perhaps better to make specific reference to the other instructions explaining what constitutes a waiver.

[53] Bersche v. Globe Mut. Ins. Co., 31 Mo. 546.

real value, or after the loss represented the value of the property insured or the extent and amount of the loss, greater than it really was, unless the same was done knowingly and willfully by plaintiffs, and with a fraudulent design.[53]

Misstatements made through fault or negligence of agent of insurer.

(1642) The court instructs the jury that an agent, authorized to take applications for insurance, should be deemed to be acting within the scope of his authority, where he fills up the blank application for insurance, and if, by his fault or negligence, it contains a material misstatement, not authorized by the instructions of the party who signs it, the wrong should be imputed to the defendant, and not to the assured.[54]

(1643) The court instructs the jury that if they believe from the evidence that the surveyor and agent of defendant, on being applied to for an insurance policy upon the plaintiff's mill, went to see the mill, and made a survey thereof, and that the plaintiff did not accompany the agent but left the agent to transact the business and do whatever was necessary and that the agent then made out the application for the plaintiff to sign and used the printed blank furnished to agents for that purpose and that the agent was informed at this time by plaintiff that there was a mortgage on the premises, then the jury are instructed that though the application made no mention of any incumbrance, such failure was not a breach of the warranty or concealment of important matters affecting the risk, though the application required the applicant to state whether the property was incumbered, by what, and to what amount, and though the by-laws of the defendant made the person taking the survey the agent of the applicant.[55]

Same—Representations as to condition and occupancy of premises insured.

(1644) The court instructs the jury that if they believe,

[54] Rowley v. Empire Ins. Co., 36 N. Y. (9 Tiff.) 550.

[55] Masters v. Madison County Mut. Ins. Co., 11 Barb. 624.

from the evidence, that at the time of the making of the application in this case, the plaintiff gave full and exact information to E., the agent of defendant, as to the number of tenants in the occupancy of the building in question, and the use thereof by each; that with such information furnished, the agent himself filled up the application in question as the same now is, and induced, by mistake or otherwise, the plaintiff to sign the application and survey; then, though the jury should find, from the evidence, that the building was occupied by more tenants, and for other business than named in the application, the defendant is estopped from making such objection, to prevent fraud and injustice, and the plaintiff will be entitled to recover.[56]

Materiality of representation as to keeping watchman.

(1645) The court instructs the jury that even if the jury shall believe from the evidence that at the time the insurance was applied for by the plaintiffs or their agent, the plaintiffs or their agent represented that a watchman was kept and would be kept upon said premises insured, and that no watchman was then or afterwards kept thereon, yet, unless the jury believe that the said representation was one of the causes why defendant took the risk, and without such watchman being then kept and continuing to be kept, the said defendant would not have taken the risk or issued the policy, then the fact that no watchman was kept will constitute no defense to this action.[57]

Duty to disclose particular circumstances of peril.

(1646) The court instructs the jury that actual fraud always vitiates the contract, and that an applicant for insurance must communicate all knowledge which he has or is required by law to have of extraordinary circumstances of peril to

[56] Approved in Howard Fire & Marine Ins. Co. of Philadelphia v. Cornick, 24 Ill. 455.

[57] Bersche v. Globe Mut. Ins. Co., 31 Mo. 546.

which the property is exposed, when the same could not, with reasonable diligence be known by the insurer or reasonably anticipated by him as the foundation of suitable inquiries and if the jury believe from the evidence that the applicant for the policy here sued on knew that an attempt had been made to burn the building sought to be insured and described in the declaration, prior to his application, then it was the duty of the applicant to have made known this circumstance to the defendant, and if the evidence discloses such fact, if it be a fact, it will preclude the plaintiff from recovering in this suit.[58]

Character of property—Generation of illuminating gas.

(1647) The court instructs the jury that the policy here sued on contains a clause prohibiting, unless by special agreement indorsed on the policy, the generating or evaporating within the building insured or contiguous thereto of any substance for a burning gas or the use of gasoline for lighting, and the court instructs the jury that if they believe from the evidence that plaintiff constructed works fifty feet from the building insured and covered by this policy for the manufacture of gas from gasoline which was conducted to the building insured through pipes, then the jury are instructed that such gas works, if they believe from the evidence that they were so constructed, were not contiguous to the building within the meaning of the policy.[59]

Avoidance of policy for misrepresentations by insured as to nature of title.

(1648) The court instructs the jury that if they believe from the evidence that the plaintiff disclosed to the agent of the defendant all the facts bearing upon her title to the property covered by the policy here sued on, and the agent receiving the application of plaintiff inserted in the applica-

[58] Elliott, Insurance, § 84; Walden v. Louisiana Ins. Co., 12 La. 134.
[59] Arkell v. Commerce Ins. Co., 69 N. Y. 191.

tion what purported to be a description of the kind of title which plaintiff had to the property insured describing the title as one in fee simple and received the payment of the premium, then the jury are instructed that the fact that plaintiff did not own the property insured in fee simple will not avoid the policy.[60]

(1649) The court instructs the jury that by the policy here sued on the answers to the questions contained in the application for the insurance policy were made warranties and that if the jury believe from the evidence that the plaintiff in answer to a question in the printed application stated that he was the owner in fee simple of the premises described in the declaration and covered by the policy and the plaintiff was not the owner of the fee simple of the property covered by the policy, but was only a tenant for life, then the jury are instructed that the policy by its terms is void, though the jury may believe from the evidence that the agent taking the application of plaintiff had notice of the nature of the interest of plaintiff in the insured premises.[61]

(1650) The court instructs the jury that the policy here sued on was issued to the plaintiff as the owner of the personal property described in the declaration and that the language used in such policy imported that the plaintiff warranted that he was the owner of the property insured at the time of taking out such policy and if the jury believe from the evidence that the plaintiff was only the possessor of the property insured under a contract of purchase, on which he had made payments, but that the plaintiff had informed the defendant insurance company of the facts at the time of his application for the policy and that the defendant, after such information, wrote out the application, stating that the plaintiff was the owner of the property insured and received the premium from the plaintiff and the policy was thereupon issued to the plaintiff,

[60] Rockford Ins. Co. v. Nelson, 75 Ill. 548.

[61] Pierce v. Empire Ins. Co., 62 Barb. 636.

then the jury are instructed that the defendant cannot defend upon the ground that the plaintiff's interest in the property insured was not truly stated in the application.[62]

Misrepresentations as to amount of incumbrance on property insured.

(1651) The court instructs the jury that one fact for you to determine in this case is whether the plaintiff correctly informed the agent of the defendant as to the actual amount of incumbrance on the premises covered by insurance in this case. If you find from the evidence that plaintiff correctly stated the amount of incumbrance to defendant's agent, you will then determine whether the agent inserted the recital in the application as to the amount of incumbrance understandingly or not. You will also determine whether the recital was inserted by the agent by mistake. If plaintiff correctly informed the agent as to the amount of incumbrance, and a statement in the application that the incumbrance was $——— was inserted by the agent knowing the true amount or through mistake, and the application was then presented for plaintiff to sign, but plaintiff did not read the application, understanding by the acts and conduct of the agent that the application correctly stated the answer which he had made to the question concerning the incumbrance, and plaintiff so signed it, then the claim of fraud made by the defendant with regard to statements of the incumbrance cannot be maintained, and the policy will not be void on that account. But if plaintiff understood the amount of incumbrance that was recited in the application, and defendant's agent misunderstood the statement of the plaintiff, either through deafness or some other reason, and if plaintiff knew the amount stated in the application to be wrong and signed the application so

[62] Lasher v. Northwestern Nat. Ins. Co., 55 How. Pr. 318. Observe that in this case the instruction is predicated upon the hypothesis that the defendant (not merely the agent) had knowledge of the facts.

knowing, then this will avoid the policy. It is for the jury to determine how the amount of incumbrance recited in the application came to be so recited and what the parties knew and understood in regard thereto.[63]

(1652) The court instructs the jury that if plaintiff had an offer to read that application and neglected to do so on her own motion, of her own will, not misled by the acts or conduct of the agent, or lulled into silence as to what it contained by his acts and conduct, in preparing the application, and all the circumstances surrounding the preparation of it, and plaintiff's failure to read was a mere act of carelessness or neglect on her own part,—then, under those circumstances, the policy would be void, and she could not recover in this case.[64]

(1653) The court instructs the jury that the policy here sued on made the application for insurance a part of the contract of insurance and was made subject to the rules of the company, which provided that the policy should be void if the application should not contain a full, fair, substantial and true representation of all the facts and circumstances respecting the property insured so far as within the knowledge of the insured and material to the risk, and the court instructs the jury that if they believe from the evidence that the plaintiff on application for the policy here sued on stated that she was the owner of the land upon which the building stood and that she was a widow and that her only title was a life estate under the will of her husband, which contained no disposition of the remainder, and that her husband left two children not named in the will and that they had not during the period of twelve years that had elapsed since the probate of the will, and during the period of six years before the application for the insurance was made, claimed the share to which they would have been entitled if the husband had died intestate,

[63] Approved in Tubbs v. Dwelling-House Ins. Co., 84 Mich. 646.
[64] Approved in Tubbs v. Dwelling-House Ins. Co., 84 Mich. 646.

then the jury are instructed that the answer of the plaintiff was a sufficient description of her interest.[65]

Avoidance of policy because of overvaluation of property insured.

(1654) The court instructs the jury that where a policy of insurance is silent in regard to an overvaluation of property insured, the statement of the value of the property in the application for insurance, is not one which the assured warrants to be true, and where the agent of the insured knows, or can judge of the value of the property himself, and accepts an application without objection to the statement therein of the value, even if such valuation is higher than it should be, such overvaluation will not avoid the policy.[66]

(1655) The court instructs the jury that if they believe, from the evidence, that plaintiff in his application for insurance, made a false or untrue statement as to the value or ownership of the property insured as an inducement to the company to enter into the contract of insurance, and that the company relied upon such statements, and was induced thereby to enter into such contract of insurance, then such contract is voidable, by its terms and conditions, by the company, and cannot be enforced against it, and the verdict should be for defendant, unless you further believe from the evidence that defendant, after it had full knowledge of such representations, waived its right to a forfeiture of said policy on that ground.[67]

Violation of condition of policy as to occupancy of premises.

(1656) The court instructs the jury that if the premises described in the policy sued upon or any part thereof, were, at the time of the issuing of said policy, occupied by other ten-

[65] Allen v. Charlestown, etc., Ins. Co., 5 Gray (Mass.) 384.

[66] Insurance Co. of North America v. McDowell & Brown, 50 Ill. 120; Merchants' Ins. Co. of Chicago v. Same, Id.; Lumberman's Ins. Co. v. Same, Id.

[67] Approved in German Fire Ins. Co. of Peoria v. Grunert, 112 Ill. 68.

ants than said plaintiffs, then said policy was void, and the plaintiffs cannot recover in this action, unless the proof establishes, to the satisfaction of the jury, a state of facts estopping the defendants from taking advantage of the condition in the policy. (Here state the facts which would create an estoppel.)[68]

(1657) The court instructs the jury that the policy sued upon in this case was (upon the plaintiff's saw mill, water power, and upon his fixed and movable machinery, mill tools and implements contained in the mill and contained a condition that if the premises should become vacant and unoccupied the policy should become void. This condition must be construed in view of the situation and character of the property insured. The mill covered by the policy was a saw mill. Delays and interruptions incident to the business of conducting a saw mill, though involving the temporary discontinuance of the active use of the mill for sawing purposes, would not make the mill "vacant and unoccupied" within the meaning of the condition of the policy, and unless the jury believe from the evidence that the saw mill had become vacant and unoccupied and that the plaintiff had ceased to use the saw mill for the purpose of sawing timber, the jury must find that the policy did not become void because of the above-recited condition).[69]

(1658) The court instructs the jury that the policy here sued on contains a condition that if the house of plaintiff covered by the policy should become vacant by the removal of the owner, the policy would be void, and the court instructs the jury that if they believe from the evidence that plaintiff did not permanently remove from the premises insured and abandon the premises insured as a place of residence, then the jury must find that the above-recited condition of the policy

[68] Approved in Howard Fire & Marine Ins. Co. of Philadelphia v. Cornick, 24 Ill. 455.

[69] Whitney v. Black River Ins. Co., 72 N. Y. (27 Sickels) 117.

was not violated, though the jury may believe from the evidence that the plaintiff temporarily went away upon a journey leaving his furniture and effects in the house and intending to return to it as his place of residence.[70]

(1659) The court instructs the jury that the policy here sued on contains a condition against the building insured becoming vacant and unoccupied, and this condition must be construed in the light of the situation and character of the property insured and the ordinary incidents and contingencies affecting the use to which it and other property of similar character in the same use is subject, and if the jury believe from the evidence that the plaintiff in his application for insurance described the building to be insured as his dwelling house and that the plaintiff during the life of the policy moved out of the dwelling house described in the policy here sued on and left no person in the occupation of the house, then the jury are instructed that the house became vacant or unoccupied within the meaning of the condition above recited and plaintiff cannot recover if the jury believe from the evidence that defendant did not waive such condition.[71]

(1660) The court instructs the jury that the policy here sued on by its terms becomes void, if the building described in the policy be or become vacant and unoccupied and so remain for ten days without the consent of the defendant, and if the jury believe from the evidence that the building covered by the policy here sued on was insured as plaintiff's dwelling house and that plaintiff, after the beginning of the risk ceased to use the dwelling as his family residence, but still continued to store his household goods in the building ready for use and if the jury believe from the evidence that the building covered by the policy continued to be occupied by one or more members of the family or a tenant having access to the entire building for the purpose of caring for the same

[70] Cummins v. Agricultural Ins. Co., 67 N. Y. (22 Sickels) 260.

[71] Hotchkiss v. Phoenix Ins. Co., 76 Wis. 269.

and that the building was cared for and some use made of it as a place of abode, then the jury are instructed that the building did not become vacant and unoccupied within the meaning of the condition of the policy above recited and plaintiff is not precluded from recovery by reason of having ceased to use the building as a family residence.[72]

(1661) The court instructs the jury that although the policy in this case specifies that the premises were occupied by a tenant, still if the agent of the company knew that, as a matter of fact, when the policy was issued, the premises were not occupied by a tenant, then the plaintiff may recover, notwithstanding such vacancy of the premises.[73]

(1662) You will take all the testimony into consideration and see whether there was a representation that these premises were occupied at that time, and if there was a representation that they were so occupied, and the premises were afterwards destroyed while they were vacant, the plaintiff is not entitled to recover.[74]

(1663) The court instructs the jury that by the terms of the insurance policy sued on in this case and which we have read to you, we discover the intention of the defendant to be, to insure occupied property, and if the jury believe from the evidence that when the policy was originally taken out or at any subsequent time when the policy was renewed or continued, there was a representation made that the premises covered by the policy were occupied and subsequently they became unoccupied and were destroyed while they were so unoccupied and neither the agent nor the defendant had any knowledge that the premises in question were unoccupied,

[72] Moody v. Amazon Ins. Co., 52 Ohio St. 12. What constitutes vacancy or nonoccupancy of a building is a question of law.

[73] Aurora Fire & Marine Ins. Co. v. Kranich, 36 Mich. 289.

[74] Aurora Fire & Marine Ins. Co. v. Kranich, 36 Mich. 289.

then the jury are instructed that the plaintiff so far as this point has any bearing, will not be entitled to recover.[75]

(1664) The court instructs the jury that the defendant insists that the condition of the policy has been broken by the assured by reason of which the policy became void and because the building was left unoccupied for a space of time inconsistent with the ordinary use of the building, such as increased the risk and that this was without notice to the company and without defendant's consent. It is stipulated in the policy that if the premises become unoccupied without the consent of defendant indorsed on the policy, the policy shall be void. It will be for you to say whether the house has been occupied in such manner as was reasonable and might have been reasonably anticipated by the parties to the policy, and if so, then this defense will not avail the defendant, and if you find that the same became unoccupied for an unreasonable time under the circumstances, then the defense upon this point will defeat the plaintiff. This clause in the policy has a meaning but the jury must determine whether considering the character of the house and the business carried on within it, there has been such a breach of the contract in this regard as to render the policy void, and the court cannot properly indicate any view that it may take of the case.[76]

Avoidance of policy because of increase of risk.

(1665) The court instructs the jury that a condition in the policy against any increase in the risk must be given a reasonable construction and is not broken by every act which in any degree increases the risk, and though the jury believe from the evidence that the building of plaintiff described in the declaration and covered by the policy here sued on and insured as a dwelling house was used for the illegal sale of

[75] Aurora Fire & Marine Ins. Co. v. Kranich, 36 Mich. 289.

[76] Approved in East Texas Fire Ins. Co. v. Dyches, for use of McDannell & Co., 56 Tex. 565.

intoxicating liquors, yet this fact, if it be a fact, does not, as a matter of law, increase the risk so as to avoid the policy, but that it is for the jury to say whether the risk has been increased so as to preclude plaintiff from recovery.[77]

(1666) The court instructs the jury that a policy of insurance is rendered void if the hazard be increased by any means within the control or knowledge of the insured, without the consent of the insurance company, and if the jury believe from the evidence that a grocery store was erected by (A) near the property of the plaintiff described in the declaration and covered by the policy here sued on, and that such erection of the grocery store created a substantial increase in the risk covered by the policy, then the jury are instructed that plaintiff is precluded from recovering on this policy, unless the defendant consented to continue the policy after acquiring knowledge of the increase in the risk.[78]

(1667) The court instructs the jury that this action is upon a policy of insurance against loss by fire issued by the defendant to cover merchandise contained in (a brick store No. 360 ——— street). The policy on which the action is brought contains a clause avoiding the policy in case of an increase of the risk and provides that a manufacturing establishment or workshop shall be considered as hazardous and extrahazardous, and the court instructs the jury that by the word "premises" as used in the policy must be understood the place in which the plaintiff represented his property to be and which the defendant described in the policy to be the place where the property insured was stored, and if the jury believe from the evidence that at the time of taking out the insurance, plaintiff was the proprietor of the basement and first story of the building at (360 ——— street), and not of the whole store, but that the insurance obtained by the plaintiff covered goods in any part of the store, and if the jury be-

[77] Martin v. Capital Ins. Co., 85 Iowa, 643.

[78] Jauvrin v. Rockingham, etc., Ins. Co., 46 Atl. 686.

lieve from the evidence that plaintiff had stored goods in the fifth story of the building, then the jury are instructed that such goods so stored would be protected by the insurance as much as if they had been stored in the cellar, and if the jury believe from the evidence that plaintiff permitted A to occupy the upper stories of the store with a manufactory, then the jury are instructed that the risk was increased within the terms and conditions of the policy above recited and the policy is forfeited.[79]

Condition in policy against other insurance.

(1668) The court instructs the jury that where the agent of an insurance company at the time he writes a policy, has knowledge of an incumbrance on the property insured or that the insured has procured or arranged to procure concurrent insurance on the premises, his knowledge binds the company in the absence of fraud, and the company is estopped to claim the invalidity of the policy on such grounds, notwithstanding any provisions of the policy in that regard.[80]

Avoidance of policy for failure to give notice of subsequent insurance.

(1669) The court instructs the jury that by one of the conditions annexed to the policy here sued on the defendant may elect, at any time and for any cause, to terminate the insurance, by giving notice to the assured and returning a due proportion of the premium, and it was also one of the conditions of the policy that notice should be given with reasonable diligence of any subsequent insurance and the court instructs the jury that if they believe from the evidence that the plaintiff took out other insurance than the policy here sued on after the taking out of such policy and that plaintiff failed to give notice for more than twenty days of such sub-

[79] Appleby v. Firemen's Fund Ins. Co., 45 Barb. 454; Same v. Astor Fire Insurance Co., Id.

[80] McElroy v. British America Assur. Co. of Toronto, Canada, 94 Fed. 990.

sequent insurance, the jury are instructed as a matter of law that the policy was forfeited.[81]

Written consent to other insurance.

(1670) The court instructs the jury that if they believe that the defendant gave its written consent to plaintiffs to get other insurance, and that such writing has been lost or mislaid by the agents of the defendants, and without any fault upon the part of plaintiffs, then the plaintiffs ought not to suffer thereby.[82]

(1671) The court instructs the jury that if the plaintiffs procured the written permission of the agent to get other insurance and the agent neglected to indorse the same on the policy, or inform the company, then the plaintiffs cannot be affected by such neglect, if such agent had authority to give the permission, which is a fact for the jury.[83]

(1672) It is the duty of a holder of a policy of insurance to inform the company or its agent of any change of the status of the thing or risk; in like manner it is his duty, within a reasonable time, to duly notify the company in which the first policy was taken out, of any additional security by additional insurance, in order that said company may inquire into the solvency and standing of the companies, which, in case of loss, must share such loss. Where it is in evidence that the insured obtained further insurance in other companies, contrary to the stipulations of policy sued on, such policy is vitiated. By the terms of the policy sued on, consent in writing on the policy itself is requisite; but if such consent in writing were in fact given by the defendant company, or by some agent who had the authority to give such written consent, after plaintiffs obtained additional insurance in other companies, they having previously notified the agent, who, according to the terms of his agency, was

[81] Mellen v. Hamilton Fire Ins. Co., 3 Smith, 609.

[82] Planters' Mut. Ins. Co. v. Lyons, Lindenthal & Co., 38 Tex. 253.

[83] Planters' Mut. Ins. Co. v. Lyons, Lindenthal & Co., 38 Tex. 253.

charged with the duty of receiving such notice, then such written consent is binding upon the company; but the burden of proof is upon plaintiffs, and plaintiffs must satisfy the jury by proof that M. did give the written consent, after he was informed of the amount of additional insurance, and the company in which such additional insurance was so obtained; and furthermore, plaintiffs must prove that M. had the authority to give such consent. No presumption of such authority arises, but such an authority must be proved by plaintiffs.[84]

Forfeiture of policy for violation of condition with regard to care of property.

(1673) The court instructs the jury that the policy here sued on requires plaintiff to keep at all times ready for use in case of fire four buckets of water in the basement story of the building insured and eight buckets of water on the middle floor, and that if the jury believe from the evidence that the buckets of water could not be kept in the (mill) filled with water all the time in accordance with the literal provisions of the policy, because of the danger of freezing, then a literal compliance with the said provisions of the policy concerning buckets was not required and could not have been in contemplation of the parties when the policy was made, but all that was required of plaintiff in order to comply with said stipulation, was to have the required number of buckets in good and serviceable condition at the proper place ready for instant use.[85]

Prohibited articles—Keeping gasoline on premises.

(1674) The court instructs the jury that the policy here sued on by its terms covers the stock of goods kept in plaintiff's store, such as is usually kept in country stores, and that the policy contains a condition that it shall be void if gasoline

[84] Planters' Mut. Ins. Co. v. Lyons, Lindenthal & Co., 38 Tex. 253.
[85] Aurora Fire Ins. Co. v. Eddy, 55 Ill. 213.

is kept, used or allowed on the premises, and if the jury believe from the evidence that gasoline is an article usually kept in country stores, and that the plaintiff kept gasoline on the premises insured and covered by the policy here sued on as a part of his stock of merchandise for sale, and that it was the intention of the defendant to insure gasoline if it was an article usually kept in country stores, then the jury are instructed that the fact that plaintiff kept gasoline upon his premises as part of his stock of merchandise, will not prevent the plaintiff recovering on this policy.[86]

Forfeiture of policy for breach of agreement as to watchman.

(1675) The court instructs the jury that the survey accompanying and made a part of the fire policy here sued on stating that a watchman was kept on the premises of plaintiff all night and at all times when the workmen were absent amounted to a warranty that plaintiff would keep a watchman on the premises all night, and the court instructs the jury that if they believe from the evidence that the night before the fire which occasioned the loss here sued for, the sheriff levied upon the insured premises and excluded all persons from it, but his deputy, and that the plaintiff remained up to the discovery of the fire at an office about two rods from where the fire occurred, but without keeping watch, then the levy by the sheriff did not excuse the plaintiff for breach of warranty to keep a watchman on the premises and that the policy here sued on was forfeited by reason of such facts, if the jury find them to exist.[87]

Keeping books and papers in safe.

(1676) The court instructs the jury that the policy here sued on required the plaintiff to keep the books containing

[86] Yoch v. Home, etc., Ins. Co., 111 Cal. 503.

[87] First Nat. Bank of Ballston Spa v. President & Directors of Insurance Company of North America, 50 N. Y. 45.

a record of his business together with his last inventory, securely locked in a fireproof safe at night or in some secure place not exposed to a fire, which might destroy the house where plaintiff's business was carried on and if the jury believe from the evidence that the plaintiff on the approach of the fire to his building, which is alleged to have caused the loss here sued for, removed his books in the night from the safe to a place of safety away from the building, and that during such removal the inventory was accidentally lost, then the jury are instructed that such removal and loss did not forfeit the policy.[88]

(1677) The court instructs the jury that the policy here sued on required plaintiff to keep a set of books and inventory in a fireproof safe during closing hours of business and if the jury believe from the evidence that the plaintiff made entries of sales in a blotter, which were thereafter transferred to a ledger, and that he made no entries in the ledger of sales covering the four days before the loss occurred, and that the blotter, which was the only record of these sales, and of merchandise used by the plaintiff for three months preceding the alleged loss was not placed in an iron safe and was burned, then the jury are instructed that there was not a substantial compliance of plaintiff with the condition of the policy requiring the keeping of a set of books and inventory in a fireproof safe during closing hours and that the policy is forfeited, unless the forfeiture was waived by defendant.[89]

Defense that fire was caused by plaintiff.

(1678) The jury is instructed that one of the questions submitted to them is, whether the fire originated by any act design or procurement on the part of the plaintiff, or through any evil practice done or suffered by his privity, or with his consent. In deciding this question, the jury must take into account every fact and incident connected with the fire and

[88] Liverpool & London & Globe Ins. Co. v. Kearney, 94 Fed. 314.
[89] Georgia Home Ins. Co. v. Allen, 24 So. 399.

subsequent transactions, as detailed in evidence before them, and decide according to what they consider the most probable conclusion. The rule in civil cases, like the present, is different from what it is in criminal cases. In criminal cases the question is as to the guilt or innocence of a crime, and there the jury must be satisfied that the offense was committed beyond a reasonable doubt by the person accused. In criminal cases, if any reasonable doubt remains in the minds of the jury, they are bound to give the accused the benefit of such doubt. But in civil cases like the present, there is no question whether any crime has been committed. The question in this case is merely a question of greater or less probability, and the jury in order to find a verdict for the defendant need not be satisfied of the complicity of the plaintiff in the burning in any other way, or with any different degree of satisfaction, than if the question was an ordinary question in a civil case.[90]

Losses covered by policy.

(1679) The court instructs the jury that the policy here sued on excepts from the risk loss occasioned by the failure of the plaintiff to use reasonable care to save and preserve his property at and after a fire or when the property is endangered by fire existing in the neighborhood, and if the jury believe from the evidence that plaintiff neglected to use all possible efforts to save or preserve the property from the consequences of the fire alleged to have occasioned the loss here sued for, then the jury are instructed that plaintiff cannot recover for any loss, or damage occasioned by such failure to use all possible efforts to save or preserve his property.[91]

Renewal of policy.

(1680) The court instructs the jury that if you find that previous to ———, 19—, the defendant company had issued

[90] Rothchild v. American Cent. Ins. Co., 62 Mo. 356.

[91] Ellsworth v. Aetna Ins. Co., 89 N. Y. 186; Elliott, Insurance, § 231.

a policy of insurance upon the building and stock in question which would expire on that date, and that about the time of its expiration the agent of the company for and in its behalf agreed with the plaintiff or his authorized agent to renew the said policy, and that he, the agent of the company, would attend to it right away; and that their minds met as to the terms of such agreement; and that there was nothing further to be done between the parties except that the agent of the defendant should make out and deliver to the plaintiff or his agent, the renewal receipt or evidence of renewal, and that the plaintiff or his agent should then or at some subsequent time pay the premium, then I instruct you that such an agreement would bind the defendant company to renew the policy and they could only avoid liability upon such contract by tendering the renewal and demanding the premium and the failure of the plaintiff to pay the same; or by giving the plaintiff or his agent notice that the defendant company had refused to carry the risk; and such tender of the renewal and demand of the premium or the giving of the notice as before stated, in order to relieve the defendant from liability, must be done before loss occurred and before they knew of the loss.[92]

(1681) The court instructs the jury that if you find from the evidence that the parties agreed that the insurance should be renewed without a payment of a premium and their minds met and they fully understood the terms of such renewal in all respects and nothing remained to be done thereto except to make out the renewal receipt on the part of the company, and the payment of the premium by the plaintiff, notwithstanding this was a verbal agreement, it was nevertheless a valid contract for the renewal of the policy, and the defendant is liable for the loss to the amount of the insurance.[93]

[92] King v. Hekla Fire Ins. Co., 58 Wis. 508.
[93] King v. Hekla Fire Ins. Co., 58 Wis. 508.

V. Waiver of Right to Avoid or Forfeit Fire Insurance Policy.

In general.

(1682) The court instructs the jury that to establish a waiver of any of the rights of the insurer, it must be shown that there was knowledge on the part of the insurer of the act or omission on the part of the insured which it claimed to have dispensed with or waived. Knowledge of a waiver need not be expressly shown, but may be implied, when the act of commission or omission is of such a character as fairly to preclude the idea of ignorance.[94]

(1683) The court instructs the jury that if they believe from the evidence that the defendant for a month or more after becoming aware of the fact that the policy here sued on was forfeited by reason of the violation of one of the conditions of the policy, and until the proofs of loss were furnished, remained silent and inactive, but that upon receiving the proofs of loss the defendant immediately notified the plaintiff that the policy was forfeited and that after such notification the defendant performed no acts inconsistent with such claim of forfeiture, then if the jury believe from the evidence that the plaintiff was in no way misled by any act or statement of the defendant to his prejudice, the jury are instructed that the waiver of such forfeiture is not established.[95]

(1684) The court instructs the jury that the policy here sued on contained a warranty by the plaintiff that a continuous clear space of one hundred and fifty feet should be maintained between the property covered by the policy and a certain building, and if the jury believe from the evidence that the agent of the defendant company who received the application of plaintiff for the policy here sued on, knew at the time of the application that the existing facts were otherwise, and that there was not such a continuous clear space of one hun-

[94] Roby v. American Cent. Ins. Co., 120 N. Y. 510.

[95] Gibson Electric Co. v. Liverpool & London & Globe Ins. Co., 159 N. Y. 418.

dred and fifty feet and that it was not in the power of plaintiff to change the facts and if the jury believe from the evidence that notwithstanding such knowledge, the agent accepted the premium and issued the policy, then the court instructs the jury that the right to insist that the policy was forfeited by reason of the breach of such warranty, is gone.[96]

Waiver of condition that watchman should be kept.

(1685) The court instructs the jury that although they may believe that at the time of making the application for the policy sued upon by plaintiffs, or their agents, it was represented by them, or their agents, that a watchman was and would be kept in charge of the premises insured, and that the matter was regarded by the agents of defendant as material to the risk, that is, without such representations, the risk would not have been taken, or a higher rate of premium would have been charged therefor; and that the building was damaged or lost by fire, and at the time there was no watchman in charge of the premises; and that the defendant, by its authorized officers and agents, knew these facts, and with such knowledge the defendant alone, or in conjunction with other companies, agreed to make good the loss by rebuilding the premises and notified plaintiffs thereof, and failed or refused to rebuild and made no objection to make good the loss on the ground that no watchman was in charge of the premises at the time of the fire until after the institution of this suit; then from these circumstances the jury are authorized to infer that defendant waived the matter and in such case it constitutes no defense to this suit.[97]

(1686) The court instructs the jury that if the jury believe from the evidence that the defendant gave to plaintiffs the notice of their intention to rebuild the premises destroyed by fire given in evidence by the plaintiffs and at the time of giving notice, the defendant knew that no watchman had been

[96] Michigan, etc., Co. v. State, etc., Ins. Co., 94 Mich. 389.

[97] Bersche v. Globe Mut. Ins. Co., 31 Mo. 546.

kept upon said premises from the time of the issuing of said policy to the time of the happening of the loss, then the jury may infer that the defendants waived their right to interpose that fact as a defense to the right of plaintiffs to recover under the policy, and the burden of proof is on the defendant to satisfy the jury that at the time of giving such notice the defendant was ignorant of that fact.[98]

Waiver of right to avoid policy for misrepresentations in application.

(1687) The court instructs the jury that the policy herein sued on contains a clause that he who procured the insurance should be held to be the agent of the insured, and also another clause, that the application must be made out by an authorized agent of the insurer and if the jury believe from the evidence that plaintiff signed a blank form of application for the insurance policy here sued on in defendant company, and that such blank form was filled up by the agent of the defendant company without any knowledge or dictation of the plaintiff and that this application so filled up contained false answers and statements caused by the carelessness, mistake or inadvertence of the agent, and not through any false representations of the plaintiff, then the jury are instructed that the false answers inserted in the application by the agent, if the jury find that they were so inserted by the agent, do not forfeit the policy.[99]

Waiver of condition requiring consent of insurer to other insurance.

(1688) The court instructs the jury that by the terms of the policy here sued on the consent of the defendant to other insurance must be obtained and indorsed upon the policy, and if the jury believe from the evidence that the local agent who issued the policy for plaintiff gave a mere oral permission to

[98] Bersche v. Globe Mut. Ins. Co., 31 Mo. 546.

[99] Sprague v. Holland Purchase Ins. Co., 69 N. Y. 128.

plaintiff to take out other insurance and that in pursuance of such oral permission plaintiff did take out other insurance, then the court instructs the jury that the consent of the agent so given is not binding upon the company and does not prevent a forfeiture of the policy, the policy providing that no agent shall have power to waive any provisions or conditions except by writing attached to the policy.[100]

Same—Parol waiver.

(1689) The court instructs the jury that if they believe from the evidence that the condition in the policy here sued on against other insurance was violated by the plaintiff by taking out of further insurance without the knowledge of the company and that the taking out of such other insurance was made the subject of a verbal communication to an agent of the defendant, then the jury are instructed that the policy is forfeited, the policy prescribing that consent to such other insurance must be written upon the policy in the mode prescribed.[101]

Waiver by demanding proofs of loss.

(1690) The court instructs the jury that if they believe from the evidence that defendant had knowledge of the forfeiture of the policy here sued on by reason of the violation of the conditions of the policy by plaintiff and that the defendant remained silent after acquiring such knowledge, and that the defendant put the plaintiff to the inconvenience and expense of preparing proofs of loss, then the jury are instructed that the forfeiture of the policy was waived.[102]

(1691) The court instructs the jury that if they believe from the evidence that defendant knew that misrepresentations had been made by plaintiff in his application for the

[100] Elliott, Insurance, § 249.

[101] Baumgartel v. Providence-Washington Ins. Co., 136 N. Y. 547, 10 Misc. 157.

[102] Thompson v. Phenix Ins. Co., 136 U. S. 287. Observe that in this case the insurance company required proofs of loss.

policy of insurance here sued upon, and after the knowledge of such alleged misrepresentations, demanded of plaintiff that he make and deliver proofs of loss from the fire alleged to have destroyed the property covered by the policy sued on, then as a matter of law, the defendant will be presumed to have waived any defense which it may have had by reason of such misrepresentations.[103]

Prohibition against operating factory at night—Estoppel to assert.

(1692) The court instructs the jury that the policy here sued on contains this language: "This entire policy, unless otherwise provided by agreement, shall be void, if the insured now has, or shall hereafter make or procure any other contract of insurance, or if the subject of insurance be a manufacturing establishment, and it be operated in whole or in part, at night later than ten o'clock." Now, the testimony in this case shows that this establishment was operated at night and the loss actually occurred at three or four o'clock in the morning. I charge you, however, that if at the time this policy was delivered by the agent to the insurance company, he knew that the manufactory was being operated at night, the company is estopped from making this claim, that is to say, the company, under such circumstances as that, must be assumed to have that knowledge, and to make the insurance with it. So that, in the disposition of that question, the simple thing for you to determine is whether or not the agent had the knowledge at the time he delivered the policy. If he did, then the policy is valid; if he did not, the policy is void.[104]

[103] German Fire Ins. Co. of Peoria v. Grunert, 112 Ill. 68.

[104] Improved Match Co. v. Michigan Mut. Fire Ins. Co., 122 Mich. 256.

VI. Proofs of Loss by Fire.

Making of proofs by agent.

(1693) The court instructs the jury that if the insured does not make the proofs as required by the policy, a valid reason therefor should be shown, and it is sufficient that the insured is nonresident, dead, or was absent or insane at the time when the loss occurred, and did not return in time to make the proofs, and the court instructs the jury that if they believe from the evidence that plaintiff was at the time of the fire (giving date) absent from his home in ——— and could not be found so as to make the proofs of loss within the time specified by the policy, then in that case such proofs of loss could be made by the agent of the plaintiff.[105]

Time of making proofs of loss.

(1694) The court instructs the jury that if they believe from the evidence that there was a loss of the property described in the declaration in this suit, as therein set out, then they are authorized to determine for themselves, from all the facts and circumstances of this case as developed from the evidence, whether or not, after said loss, the plaintiffs gave immediate notice thereof in writing to the defendant as required by the policy sued on.[106]

(1695) The court instructs the jury that if they believe from the evidence that there was a loss of the property described in the declaration in this suit as therein stated, and that after the said loss, the plaintiffs did not give immediate notice thereof in writing, and did not give notice of the loss in the time required by the policy here sued on, and if the jury believe from the evidence that after the time expired for the giving of notice, plaintiffs submitted to defendants proofs of loss, and defendants accepted the proofs

[105] German Fire Ins. Co. of Peoria v. Grunert, 112 Ill. 68.
[106] Knickerbocker Ins. Co. v. Gould, 80 Ill. 388.

and retained the possession of them, and did not make any objection that the plaintiffs had not given proofs of loss within the time required by the policy, then the jury are instructed that such retention of proofs without raising an objection as to failure to give notice within the time required by the policy was not a waiver of the failure to give such notice within the time so stipulated.[107]

(1696) The court instructs the jury that if you find, from the evidence, that the defendant insurance company issued to the plaintiff the policy mentioned in the declaration in this case, and that while said policy of insurance was in full force and effect a portion of the property mentioned in and insured by said policy was, on September 8, 19—, destroyed by fire, while the same was the property of the plaintiff, and without the fault of the plaintiff, and that the plaintiff was absent at the time of such loss, and unable to make proof of the same, and that the agent of the plaintiff, who in the plaintiff's absence had full charge, management and control of plaintiff's business, and who had possession of the property insured by said policy, as such agent, in the absence of the plaintiff, made out and delivered to the defendant insurance company, on or before September 23, 19—, a written notice and proofs of loss, and that on September 23, 19—, the defendant returned such notice and proofs of loss, with objections thereto, and that the same agent of the plaintiff made out an amended notice and proofs of loss, and delivered the same to the defendant insurance company, and that said defendant insurance company on October 4, 19—, returned such amended notice and proofs of loss, with objections thereto, and that such notice and proofs of loss were again amended by the same agent of the plaintiff, so that the same substantially complied with the conditions of said policy, and delivered the same to said defendant insurance company, and that on October 26, 19—,

[107] Knickerbocker Ins. Co. v. Gould, 80 Ill. 388.

said defendant again returned said notice and proofs of loss, with objections thereto, and that said defendant, at none of the times it returned said notice and proofs of loss, objected that the plaintiff had not made out and delivered such notice and proofs of loss within the time mentioned and provided in said policy, then said defendant insurance company thereby waived all objections that said notice and proofs of loss were not delivered to said defendant within the time provided for in said policy; and if you further find, from the evidence, that plaintiff complied with all the other conditions of said policy, then you should find for the plaintiff.[108]

Proof as to cause of loss.

(1697) The court instructs the jury that if you believe from the evidence before you that the building described in the policy sued on was not destroyed by fire, you will find for defendant. In this connection you are instructed that before the plaintiff can recover, it must appear from the evidence to your satisfaction, that the fire caused the destruction of this building. If the building fell down before it was burned, and the fire occurred after the building fell down, and if you so believe from the evidence before you, you will find for the defendant. If the evidence satisfies you that the building was on fire before it fell, and that such fire caused the fall of the building, then you should find for plaintiff as previously explained in the first paragraph of these instructions.[109]

Waiver of proof of loss.

(1698) The court instructs that the proof of loss required by the terms of this policy is to be furnished within a certain time. This time having been fixed, and the parties agreeing

[108] Approved in German Fire Ins. Co. of Peoria v. Grunert, 112 Ill. 68. This instruction was criticised because it did not tell the jury they must believe from the evidence that the agent was properly qualified to make the proofs of loss.

[109] Approved in Liverpool & L. & G. Ins. Co. v. Ende, 65 Tex. 118.

to it, they were bound by it, and if the party fails to abide by the terms of his agreement, then he forfeits his right under the contract. He must be bound by the terms of the contract, as he made it. But notwithstanding this obligation on the part of a party to furnish the proofs within the proper time, and the right of the company to insist upon it in case of insurance, there may be a waiver. This is a right adopted for the benefit of the insurance company, and if the company chooses to waive it, it can do so.[110]

(1699) Mere silence is not to be taken as a waiver of the right of the insurance company to insist upon a strict compliance with the contract. But where there are other acts done, as acts have been done here, either by the company or its agents, you may take these acts into consideration, in order to discover whether there has been any waiver. In this case certain acts are relied upon by counsel for the plaintiff. One of these acts is what was said by Mr. D., as the agent of the company. The act with which Mr. D. is most immediately connected is simply a statement on his part, when informed of the loss here, that the company would not pay, because the premises were not occupied. In other words, as they claim, the statement was substantially this: "You have not carried out the terms of the contract providing for the occupancy of the premises, and we shall rely upon that as our defense." If that was the effect of it, and if that was intended to be the effect of the statement, then you may consider that as a waiver, or take the fact into consideration as a waiver of the right to insist upon proof at the proper time. On the other hand, if such is not, in your view, the fair inference to be derived from the statement,—I say, if the facts as they actually occurred do not lead to that inference,—then there was no waiver of this right, and they had a right to insist upon the terms of the policy being carried out as to the proofs.[111]

[110] Aurora Fire & Marine Ins. Co. v. Kranich, 36 Mich. 289.

[111] Aurora Fire & Marine Ins. Co. v. Kranich, 36 Mich. 289.

VII. Marine Insurance.

Losses covered.

(1700) The court instructs the jury that the plaintiffs under the pleadings in this case cannot recover, if the jury shall find from the testimony that the ——— shipped by the plaintiffs to their consignees in ———, were damaged or destroyed from ——— caused by their inherent infirmity.[112]

Abandonment.

(1701) The court instructs the jury that an abandonment not accepted might be waived by the party making it; that the fact that the mortgagee W. had taken possession of the boat and sold her because of his interest, would not have effect of waiving abandonment, if he took possession on notice by the insurers, that they would no longer be responsible for her, and after her abandonment by the mortgagor H. did so to protect the interests of all concerned; and that this was a question of intention to be judged by the acts and declarations of said W., done and made at the time.[113]

(1702) The court instructs the jury that if the mortgagor was in possession and command of the boat as captain, and the mortgages were forfeited, perhaps neither he nor the mortgagee alone could make an abandonment; but if there was a right to abandon, and the mortgagor having the command and control of the boat as master did abandon or offer to abandon to the defendants; and they knew of the existence of the mortgages and did not reject the abandonment on account of the mortgages; and if the mortgagee shortly afterwards when the offer of abandonment by the mortgagor was still unrevoked, and the boat was still at the disposal

[112] Approved in Providence & Washington Ins. Co. of Providence, R. I., v. Adler, 65 Md. 162.

[113] Approved in Fulton Ins. Co. v. Goodman, 32 Ala. 108. Before insurance was taken out, H. mortgaged his interest to W.

of the defendants so far as the mortgagor was concerned, assented to and approved of the abandonment by the mortgagor and made known to the defendants his assent and approval—an abandonment so made, if in other respects good, would be valid.[114]

(1703) The court instructs the jury that if the injury to the boat was such that her repairs would cost more than half her value when repaired at the port of repair, then the assured had the right to abandon; and in estimating the expense of repairs the jury should take into consideration the amount paid by the insurance companies for raising the boat and bringing her to ——— if, fairly expended; that it was not necessary that the expense of repairs should amount to half the sum named in the policy as the agreed value of the boat, but it was sufficient if equal to half of her value in fact when repaired.[115]

(1704) The court instructs the jury that if the condition of the boat was such that in the opinion of practical men the great probability appeared to be that she could not be raised and repaired, it was sufficient to justify an abandonment as for a total loss, though she was afterwards raised and repaired at a cost of less than half her value.[116]

(1705) The court instructs the jury that although it was the duty of the master and crew to labor for the recovery of the vessel, they were not bound to do impossibilities; and that if it appeared to practical men that the vessel could not be saved, they would be justified in abandoning her, and were not bound to wait for the decision of the underwriters on the offer to abandon.[117]

(1706) The court instructs the jury that the parol abandonment was sufficient and when once rightfully made it

[114] Approved in Fulton Ins. Co. v. Goodman, 32 Ala. 108.
[115] Approved in Fulton Ins. Co. v. Goodman, 32 Ala. 108.
[116] Approved in Fulton Ins. Co. v. Goodman, 32 Ala. 108.
[117] Approved in Fulton Ins. Co. v. Goodman, 32 Ala. 108.

fixed the rights of the assured and could not be forfeited by any subsequent event without the assent of the assured.[118]

CHAPTER LXXXIV.

JOINT LIABILITY.

Liability for joint wrong, 1707.

Liability for joint wrong.

(1707) The court instructs the jury that for joint wrongs by two or more wrongdoers, each must assume and bear the responsibility of the misconduct of all,—the law permits the injured party to treat all whose wrong or negligence co-operated in producing the injury as constituting together one party, by their joint co-operation accomplishing certain injurious results and holds them liable to respond to the injured party in a gross sum as damages, and if the jury believe from the evidence (that plaintiff was a passenger on the train of cars of one of the defendants, the ——— Company, and that through the negligence of such defendant co-operating with the negligence of the other defendant, the ——— Company, the train of cars on which plaintiff was riding collided with an engine operated by the defendant, the ——— Company, and that through such joint negligence of the above-named defendants, the plaintiff was injured, then the plaintiff may recover from the two defendants a gross sum as damages).[1]

[118] Approved in Fulton Ins. Co. v. Goodman, 32 Ala. 108.

[1] West Chicago St. R. Co. v. Horne, 100 Ill. App. 259.

The use of the word "gross" in the above instruction as meaning a lump sum is not objectionable.

CHAPTER LXXXV.

JOINT-STOCK COMPANIES.

Liability on subscription contracts, 1708, 1709.

Liability on subscription contracts.

(1708) The court instructs the jury that if they find that the defendant was induced to subscribe by the statement of the plaintiff company or its agent, that there were no promoter's profits, when in point of fact there were such profits, that it became the duty of the defendant to elect on the discovery that there were such profits to rescind his contract of subscription or else he was bound by it, and they must find for the plaintiff on the special plea.[1]

(1709) The court instructs the jury that if they find that the defendant, after discovery that there were such profits, treated the contract of subscription as a subsisting contract, they must deem that the defendant waived his right of repudiation and that a promise to pay a call after such a discovery is an act showing that he did treat the contract as a subsisting contract and is a waiver of his right to repudiate it, and they must find for the plaintiff on the special plea.[2]

[1] West End Real Estate Co. v. Claiborne, 97 Va. 734.

[2] West End Real Estate Co. v. Claiborne, 97 Va. 734.

CHAPTER LXXXVI.

LANDLORD AND TENANT.

I. The Relation—Duration and Termination.
Termination of relation, 1710-1716.
Same—Termination of tenancy at will, 1717.
Same—Waiver of forfeiture, 1718.

II. Renewal, Holding Over, Etc.
Option of tenant to renew lease—Notice of intention to renew, 1719, 1720.
Same—Action by tenant against subtenant for use and occupation, 1721, 1722.
Extension or renewal by holding over, 1723-1725.
Terms, as to rent, etc., of holding over, 1726, 1727.

III. Liabilities of Landlord to Tenant.
Trespass by tenant against landlord, 1728.
Right of landlord to enter upon premises, 1729.
Injuries to tenants or occupants—Landlord's knowledge of defects, 1730-1732.
Same—Injuries from contagious diseases, 1733.

IV. Defenses to Action for Rent.
In general, 1734, 1735.
Defense of change in condition of premises, 1736.
Fraud of landlord as defense to action for rent, 1737.
Eviction as defense to action for rent, 1738-1744.
Same—Retaking possession of part of premises, 1745-1747.
Same—Lease of part of premises to third person, 1748.
Action for rent based upon verbal lease, 1749.
Right to set off value of improvements against rent, 1750.

V. Rights and Liabilities as to Third Persons.
Liability of landlord for injuries to strangers, 1751, 1752.
Liability of tenant for injuries to third persons, 1753-1755.
Trover by landlord against third persons purchasing grain from tenant, 1756.

I. The Relation—Duration and Termination.

Termination of relation.

(1710) The court instructs the jury that a surrender exists by operation of law when the parties, without any ex-

press surrender, do something so inconsistent with the relation of landlord and tenant as to imply it, as by entering into the relation of vendor and purchaser, payment of a part of the purchase money, agreeing to pass a conveyance, and ceasing to pay or demand rent, and the court instructs the jury that if they believe from the evidence that the defendant took a lease of the premises described in the declaration from the plaintiff for a term of two years and that the defendant sublet a part of the premises, described in the declaration and covered by the lease and that the defendant subsequently gave possession of the remainder to (A.) who was accepted as a tenant by the plaintiff and that A. paid rent for the whole premises with the consent of the defendant, then the jury are instructed that this transaction constitutes a surrender of the premises by operation of law and that it is a good defense to this suit for rent by the plaintiff.[1]

(1711) The court instructs the jury that while a surrender of the lease may be by agreement, express or implied, or by operation of law, yet the facts must be such as to establish an acceptance by the landlord or an intention on his part to terminate the tenancy and if the jury believe from the evidence that after the alleged surrender of the premises described in the declaration by the defendant plaintiff draped an empty show window and occupied the floor of the building constituting the subject of the lease in a way not to interfere with its use by defendant, then the jury are instructed that this is not sufficient to show, as a matter of law, an acceptance by the landlord of the alleged surrender or an intention on his part to terminate the tenancy.[2]

(1712) The court instructs the jury that while a surrender of a lease may be by agreement, express or implied, or by operation of law, yet the facts must establish an acceptance by the landlord of the alleged surrender and if

[1] Kedney v. Rohrback, 14 Daly, 54.

[2] Requa v. Domestic Pub. Co., 11 Misc. 322, 65 State Rep. 220.

the jury believe from the evidence that (the agent of plaintiff told the defendant that there was a certain person who would take the premises off of the hands of the defendant, if the defendant would deliver up the premises described in the declaration immediately and that in reply to this the defendant said, "All right, of course it is short notice," and that the defendant said further he would see what he could do, and if the jury believe from the evidence that defendant gave the keys to the clerk of the agent of the plaintiff two days later, then the jury are instructed that this is not sufficient to establish an accepted surrender, so as to release the defendant from the payment of rent, if the jury further believe from the evidence that no communication was made to the agent after the first interview alleged to have been had).[3]

(1713) The court instructs the jury that if they believe from the evidence that the plaintiff executed to the defendant a written lease for three years and that more than a year before the lease was to expire agreed with the defendant to accept as tenant (A.) who had purchased the defendant's interest and that A. agreed to take the place of defendant and to pay rent for the remainder of the term specified in the lease to defendant and that plaintiff agreed to release the defendant from liability, and if the jury believe further from the evidence that such agreement was followed by an entry by A. and payment of rent upon his part, then the jury are instructed that this constitutes a valid defense to this action for rent by plaintiff against the defendant.[4]

(1714) The court instructs the jury that mere acceptance by a landlord of the key of the demised premises from the tenant who abandons possession during the term, is not an acceptance of the surrender if the landlord states that he receives the key and not the premises.[5]

[3] Kelly v. Noxon, 64 Hun, 281, 46 State Rep. 87.

[4] Vandekar v. Reeves, 40 Hun, 430.

[5] Townsend v. Albers, 3 N. Y. (E. D. Smith) 560.

(1715) The court instructs that where a tenant at will, before the expiration of his tenancy, quits the premises and offers to surrender the key to the landlord, and upon his refusing to receive it, throws it down, and after the tenant has left, the landlord takes it up and retains it, but the premises remain unoccupied during the remainder of the term, the landlord thereby waives no rights, and the tenancy is not determined.[6]

(1716) The court instructs the jury that if they believe from the evidence that the defendant sought to terminate his tenancy before the expiration of his lease by substituting a third person, and that the defendant on leaving the demised premises tendered the rent due up to the time of leaving and also tendered the key of the premises and that plaintiff declined to receive the key unless defendant would agree to make good the rent of the unoccupied premises until plaintiff should have an opportunity of renting them, then the jury are instructed that such conditional acceptance of the key did not have the effect of terminating the tenancy and that defendant remained liable under the lease until the termination thereof.[7]

Same—Termination of tenancy at will.

(1717) The court instructs the jury that the defendant in this case was a tenant at will of the plaintiff, and if the jury believe from the evidence that plaintiff on (June 24th) gave notice to the defendant that the premises described in the declaration would be required (July 3d) and on (August 7th) gave a second notice in writing for the defendant to surrender the premises (September 9th) and then took possession on (August 16th) while the defendant was absent and forcibly ejected the defendant when he returned, then the jury are instructed that though the plaintiff might have relied upon the first notice by waiting until thirty days had expired, and then claiming possession though the notice

[6] Withers v. Larrabee, 48 Me. 570.

[7] Nelson v. Thompson, 23 Minn. 508.

specified a shorter time, yet plaintiff by the second notice waived the first one and admitted that the tenancy still existed and plaintiff was not entitled to a surrender until thirty days after the second notice had expired and the action of plaintiff in forcibly ejecting the defendant on August 16th was therefore wrongful.[8]

Same—Waiver of forfeiture.

(1718) The court instructs the jury that any act done by a landlord who knows of a cause of forfeiture by his tenant which affirms the existence of the lease and recognizes the lessee as his tenant, is a waiver of such forfeiture. The receipt from the tenant, by the landlord, of rent accruing is such an act, and the court instructs the jury that if they believe from the evidence (that the lease by plaintiff to defendant of the premises described in the declaration contained a covenant on the part of the defendant not to assign and providing for a forfeiture in case of a breach of its covenant, and if the jury further believe from the evidence that the defendant assigned the lease to A. and that subsequently to such assignment, plaintiff acquired knowledge of the assignment, and with such knowledge accepted from the defendant rent accruing after the assignment, then the jury are instructed that this constitutes a waiver of the assignment and that A. has the power to transfer a good title to the lease without the consent of the plaintiff).[9]

II. Renewal, Holding Over, Etc.

Option of tenant to renew lease—Notice of intention to renew.

(1719) The court instructs the jury that the lease by the plaintiff to the defendant of the premises described in the declaration contains a provision for renewal in two years, upon the defendant giving a written notice three months before the expiration of the term named in the lease of the

[8] Morgan v. Powers, 83 Hun, 298, 64 State Rep. 749.

[9] H. Koehler & Co. v. Brady, 78 Hun, 443, 61 State Rep. 49.

desire of the defendant to extend the lease for a further period of two years, and if the jury believe from the evidence that the defendant gave notice as specified in the lease of his desire to extend the lease for a further period of two years and that defendant suggested that he would accept a renewal for two years and a half, and that plaintiff refused to grant the extra six months' extension but acknowledged the right of defendant to renew for two years, then the jury are instructed that this constitutes a sufficient expression of intention that defendant desired to renew his lease for two years and a sufficient exercise of the option to renew and that the defendant is liable upon the lease for the full period of two years from the expiration of the original term.[10]

(1720) The court instructs the jury that the lease of the premises described in the declaration in this suit was for a period of six months and contained a provision that defendant should have the privilege of continuing the lease for two years, at a higher rental than that named in the lease for the first six months upon the giving of a written notice within a specified time prior to the expiration of the six months, and if the jury believe from the evidence that the defendant did not give any written notice, but that defendant continued in possession of the leased premises after the expiration of the six months, for four months longer paying the higher rental which was to be paid upon renewal of the lease, then the jury are instructed that this constitutes a waiver of the provision requiring written notice of the option to renew and that defendant must be deemed to have elected to hire the premises for a further term of two years.[11]

Same—Action by tenant against subtenant for use and occupation.

(1721) On the part of the defendant the court instructs the jury, that if they believe, from the evidence, that one

[10] Chamberlain v. Dunlop, 126 N. Y. 45, 36 State Rep. 373.

[11] Long v. Stafford, 103 N. Y. 274.

S. owned the premises in question, and executed a lease therefor to the plaintiff for one year, with the privilege of renewing for one or more years, provided said S. did not sell the premises before the ———, and if they further believe, from the evidence, that the premises were sold by said S. before the ———, then they should find for the defendants.[12]

(1722) The court instructs the jury as a matter of law, that in order to constitute a sale of real estate within the meaning of the clause in the lease introduced in evidence by plaintiff, it is not necessary that a deed should actually be executed and delivered, but any written agreement by or under which a party may enforce the making and delivery of a deed of conveyance, and in pursuance of which a deed is subsequently executed and delivered, is, in the eyes of the law, a sale, within the meaning of said clause in said lease.[13]

Extension or renewal by holding over.

(1723) The court instructs the jury that the rule which permits a landlord at his election to treat a tenant who holds over after the expiration of his term as holding for another year, rests upon legal implication derived from the wrongful act of holding over, but if the jury believe from the evidence that the defendant was obliged to retain a room in the building described in the declaration as having been leased by the plaintiff to the defendant for a short time in order to avoid the peril of endangering the life of a member of his family who was seriously sick, then the jury are instructed that such act of retaining possession for such purpose is not a holding over within the meaning of the law.[14]

(1724) The court instructs the jury that if they believe from the evidence that plaintiff notified defendant before

[12] Approved in Sutherland v. Goodnow, 108 Ill. 528.

[13] Approved in Sutherland v. Goodnow, 108 Ill. 528.

[14] Herter v. Mullen, 159 N. Y. 28, 6 Ann. Cas. 329.

the expiration of the lease described in the declaration, that if the defendant should hold over and continue in possession after (May 1st) the rent would be increased to ———, and that the defendant did not complete moving out of the premises until (May 3d) and that upon May 3d defendant tendered the keys but the surrender of defendant was not accepted by plaintiff, then the jury are instructed that defendant became liable for a year's rent at the rate of ———, since it was the duty of the defendant to make a full surrender of the premises on (May 2d).[15]

(1725) The court instructs the jury that if they believe, etc., that the defendants occupied the lots in question from May 1, 1901, to May 1, 1902, under a lease for that year from the then owners of the lots, and that defendants continued to hold over and occupy the premises after May 1, 1902, with the assent of such owners, without any agreement before that time as to how they should occupy the lots, the defendants would be entitled to hold the premises for another year from May 1, 1902, and in the absence of any understanding or agreement permitting it, the plaintiff could not lawfully expel or dispossess them until May 1, 1903.[16]

Terms, as to rent, etc., of holding over.

(1726) The court instructs the jury that where a tenant holds over after the expiration of his term, with the implied assent of the lessor, it will be upon an implied undertaking, or liability, to pay rent thereafter, on the same terms as to amount and times of payment, as in the original lease.[17]

(1727) The court instructs the jury that if the landlord duly notifies his tenant, who is holding by the year, and before the expiration of the year, that if the tenant occupies the premises another year, he must pay a certain in-

[15] Frost v. Akron Iron Co., 12 Misc. 348, 66 State Rep. 785.
[16] Price v. Pittsburg, Ft. W. & C. R. Co., 34 Ill. 13.
[17] Clapp v. Noble, 84 Ill. 62.

creased rent and the tenant does not surrender possession but continues to occupy them, the tenant must be deemed to have acquiesced in the new terms and in the increased rent, and if the jury believe from the evidence that the plaintiff on ———, which date was some two months before the expiration of defendant's tenancy, notified defendant that if he continued to occupy the premises after ——— he would be required to pay rent at the rate of ———, and that the defendant continued to occupy the demised premises after ———, then the jury are instructed that defendant is liable at the increased rent named in the notice given by plaintiff on ———.[18]

III. Liabilities of Landlord to Tenant.

Trespass by tenant against landlord.

(1728) The court instructs the jury that the defendants cannot be held liable in the action unless the plaintiff shows that they directed or approved the issuing of the distress warrant of ———, and the seizure and detention of the plaintiff's property thereunder, or became aware of the seizure and failed to repudiate it, and if they believe from the evidence that the plaintiff has not shown that any one of the defendants did thus direct and approve the issuing of the distress warrant and the seizure and detention of the property of the plaintiff thereunder, or that after knowledge of the seizure (failed) to repudiate it, then the jury must find such defendants not guilty.[19]

Right of landlord to enter upon premises.

(1729) The court instructs the jury as a matter of law that if a landlord has a tenant in possession under a lease expiring at a certain time and executes to a third person a lease of the premises to begin at the expiration of the term

[18] Higgins v. Halligan, 46 Ill. 173.

[19] Fishburne v. Engledove, 91 Va. 548.

of the tenant in possession, then the right to the possession vests at the expiration of the first lease in the second lessee, and if the jury believe from the evidence that plaintiff received a lease of the premises described in the declaration dated ——— and was in possession under it on the ———, and continued in such possession until after the time of the alleged trespass by the defendant described in the declaration, and that on the ——— the defendant signed another lease to A. and that A. executed such lease intending to become a tenant of the defendant, then upon termination of the lease to the plaintiff A. became entitled to the possession of the premises described in the declaration, and if the jury believe from the evidence that the lease to A. continued in force at the time of the alleged trespass described in the declaration, then the jury are instructed that the defendant or his agents had no right of possession at the time of such alleged trespass, no matter what conditions were in the lease to the plaintiff.[20]

Injuries to tenants or occupants—Landlord's knowledge of defects.

(1730) The court instructs the jury that to render a landlord liable for injuries to his tenant arising from the defective condition of premises leased, it must appear that the landlord had some notice of the defective condition of the premises or that circumstances existed which will raise a presumption of notice to the landlord, such as an unreasonable omission to ascertain the condition of the premises, or the failure of the landlord to make necessary repairs or changes called for by the condition of the premises or in certain exigencies, and if the jury believe from the evidence (that defendant leased the building described in the declaration to plaintiff and that the boiler in the building exploded and that through such explosion plaintiff was injured, and that

[20] Beidler v. Fish, 14 Ill. App. 29.

the boiler had been in use for a considerable time without any imperfection or defect being discovered except a slight break, and that the defendant had employed a skilled mechanic to repair this slight break, then the jury are instructed that defendant is not liable for the injuries alleged to have been sustained by the plaintiff from the explosion of the boiler, though the jury may further believe from the evidence that the mechanic did not repair the break in a proper manner).[21]

(1731) The court instructs the jury that (a clothes pole is one of those common structures or appurtenances used in and about dwellings that, unless so old as to cause suspicion of unsoundness, are never subjected to more than cursory examination, and if the jury believe from the evidence that the life of a pole is ordinarily about eight years, that the defendant had erected upon the premises described in the declaration and leased to the plaintiff, a pole apparently sound and that after such pole had been in use for about five years, it broke, causing the injuries to plaintiff here sued for, and that at the time of the accident the pole had rotted almost through about an inch from the ground and that during the period in which such pole was in use, no one had noticed the defective condition of the pole or any weakness or instability in it, then the jury are instructed that no notice is to be imputed to the defendant of the defective condition of the pole, and if they further believe from the evidence that defendant had no actual notice, the jury must find a verdict for the defendant).[22]

(1732) The court instructs the jury that if (they believe from the evidence that defendant leased the apartment in

[21] Perkins v. Eighmie, 6 N. Y. Supp. 156, 2 Silv. Sup. Ct. 497, 24 State Rep. 728.

[22] Lenz v. Aldrich, 6 App. Div. 178, 39 N. Y. Supp. 1022. There was a dissenting opinion in this case which held that the question of negligence on the facts recited in the hypothesis should have been left to the jury.

the tenement house described in the declaration to the plaintiff, and that the defendant placed upon the roof of the tenement house a platform for the common use of the tenants in hanging out clothes and that through the breaking of a board in the platform so placed by the defendant, the plaintiff, while engaged in hanging out clothes, was injured, and that the defect in the board which caused the breaking was not apparent upon an ordinary examination, and that defendant had no actual notice of the defect, then the jury are instructed that defendant is not liable for the injuries so sustained by plaintiff, if the jury find that the injuries were so sustained, and the jury must render a verdict for the defendant).[23]

Same—Injuries from contagious diseases.

(1733) The court instructs the jury that the general rule of law is that a landlord who lets premises knowing that they are contaminated with infectious disease, without notifying the tenant, is liable for damages in case the disease is communicated to the defendant or his family, and if the jury believe from the evidence that the premises described in the declaration were leased by plaintiff to defendant, and at the time of the lease the premises were infected by a contagious disease with the knowledge of the plaintiff, and that the disease because of such infection of the premises was communicated to the defendant, then the jury are instructed that defendant is entitled to recover damages arising from communication of such disease, though the jury may believe from the evidence that the fact of the infection of the premises by the contagious disease was communicated to defendant by A. before defendant went into possession of the premises, if the jury further believe from the evidence that plaintiff denied the truth of the statement by A.[24]

[23] Alperin v. Earle, 55 Hun, 211, 27 State Rep. 806.

[24] Snyder v. Gorden, 46 Hun, 538, 12 State Rep. 556.

IV. Defenses to Action for Rent.

In general.

(1734) The court instructs the jury that the wrongful act of a landlord will not bar him from a recovery of rent, unless the tenant, by reason of such wrongful act, has been deprived in whole or in part of the possession, either actually or constructively, or unless the premises have been rendered useless by the wrongful act of the landlord.[25]

(1735) The court instructs the jury that if they believe from the evidence that plaintiff, the lessor of the defendant, by himself or his agents, at the time of the making of the lease, agreed with the defendant that if the defendant would lease the premises described in the declaration of said plaintiff, and enter into the said lease, dated ———, and take the same, that the said plaintiff would not let or lease any other part of the said premises or building for a saloon, or for saloon purposes, and that in consideration of such agreement as last aforesaid, the defendant did enter into and take said lease; and if the jury further believe from the evidence that thereafter, before said lease expired, said plaintiff without the consent or acquiescence of the defendant did let a part of said building described in the declaration, and a portion of which building was occupied by the defendant in pursuance of his tenancy, for a saloon, and permitted the use of a portion of the building for saloon purposes, then the jury are instructed that defendant may recover any damages which they may find from the evidence defendant sustained from the breach by plaintiff of his agreement, if they find that plaintiff made such agreement not to lease any portion of the building in which defendant was to be a tenant for the purposes of a saloon.[26]

[25] Chicago Legal News Co. v. Browne, 103 Ill. 317.

[26] Chicago Legal News Co. v. Browne, 103 Ill. 317. It was held in the above case that the violation of the agreement to refuse to lease for saloon purposes was not a defense to the action for rent.

Defense of change in condition of premises.

(1736) The court instructs the jury that a tenant who continues to occupy the whole of the demised premises during the whole period for which rent is claimed, is not released from payment of such rent by the acts of the landlord, which diminished the beneficial enjoyment of the premises during the period for which rent is sought to be recovered.[27]

Fraud of landlord as defense to action for rent.

(1737) The court instructs the jury that if the landlord is guilty of fraud in leasing premises, either in making a false statement as to their condition or in concealing something which would make the premises untenantable or unfit for the purpose for which they were rented, or render them unfit for occupancy, the tenant may abandon the premises without liability for rent and if the jury believe from the evidence that (at the time of making the lease of the premises described in the declaration, the plaintiff made a representation to the defendant that the building leased would sustain an engine which defendant desired to place in the building for the purpose of the tenancy and that the building leased would not sustain the engine, then the jury are instructed that defendant is not liable for rent, though the plaintiff did not have actual knowledge as to the truth of his representations, and though the jury may believe from the evidence that the defendant remained for a time after the building proved insufficient to sustain the engine, if the jury further find from the evidence that plaintiff promised that the walls of the building would be strengthened).[28]

Eviction as defense to action for rent.

(1738) The court instructs the jury that physical and

[27] Academy of Music v. Hackett, 2 Hilt. 217; Cable v. Bonnell, 9 Misc. 154.

[28] Myers v. Rosenback, 13 Misc. 145, 68 State Rep. 18.

forcible expulsion is not necessary to produce an eviction, but any act on the part of the landlord which deprives the tenant of the beneficial enjoyment of the premises, amounts to an eviction. This is so, if the act was done in violation of the rights of the tenant.[29]

(1739) The court instructs the jury that a physical eviction is not necessary to exonerate the tenant from payment of rent, but if the landlord's acts are of so pronounced and offensive a character as to create a nuisance, which prevents the reasonable use of the premises by the tenant, such acts will justify an abandonment of the premises and will defeat an action for subsequent rent.[30]

(1740) The court instructs the jury that the principle upon which a tenant is required to pay rent, is the beneficial enjoyment of the premises, unmolested in any way by the landlord; and if the jury believe from the evidence in this case that the plaintiff took possession of any part of the premises leased by her to the defendant against the consent of the defendant, with the intention of depriving the defendant of the enjoyment of the demised premises, then this constitutes an eviction and will release defendant from the payment of any more rent, and the jury will find for defendant.[31]

(1741) The court instructs the jury that if the tenant loses the benefit of the enjoyment of any portion of the demised premises by the act of the landlord, the rent is thereby suspended, and that if the jury believe from the evidence that plaintiff, after leasing the premises described in the declaration to the defendant, put (a water pipe through one corner of the store, about one foot from the walls, and put in a pump and sink in the upper room, which he had rented

[29] Approved in Price v. Railroad Co., 34 Ill. 17.

[30] Sully v. Schmitt, 147 N. Y. 248, 69 State Rep. 527.

[31] Walker v. Tucker, 70 Ill. 527. Approved in Smith v. Wise, 58 Ill. 143.

to the defendant, against the consent and without the knowledge of the defendant, and that the defendant kept an eating house immediately under the room in which the sink and pump were placed, and that the water leaked through and injured the room below, then it is for the jury to determine whether such acts amounted to an eviction relieving defendant from the payment of rent).[32]

(1742) The court instructs the jury that to constitute an eviction, it is not essential that the acts of the landlord should be committed with intent to compel the tenant to leave the property or deprive him of the beneficial enjoyment thereof. If the acts of the landlord are calculated to and do make it necessary for the tenant to move they constitute an eviction, and if the jury believe from the evidence that the plaintiff leased the premises described in the declaration to the defendant (and agreed to remove a body of stagnant water which flowed upon the premises leased, and if the jury believe from the evidence that the plaintiff failed to perform this duty and that through the failure to perform said duty the premises leased to plaintiff became untenantable, the jury are instructed that this constitutes an eviction and plaintiff is precluded from recovery of rent).[33]

(1743) The court instructs the jury that if the landlord, before the expiration of the lease or tenancy, against the consent of the tenant, evicts or expels the tenant from all or any substantial part of the premises leased, the tenant is discharged from the payment of any rent from the time of such eviction, and is not bound to payment for what he continues to occupy after such eviction. If there is no agreement to the contrary, the tenant is entitled to the possession of the premises without interruption or molestation by the landlord, and if the jury believe, etc., that defendant was

[32] Lynch v. Baldwin, 69 Ill. 210. Telling the jury that the above-recited facts amount to an eviction is reversible error.

[33] Tallman v. Murphy, 120 N. Y. 345, 31 State Rep. 483.

tenant from year to year, and entitled to the possession of the premises in question from ———, to ———, and that against defendant's consent, and in the absence of any understanding or agreement permitting it, the plaintiff wrongfully took possession of part of said lots for their ———, and continued to hold and use the same until ———, and evicted defendant therefrom, then such an eviction by the plaintiff works an extinguishment of all rent for said premises from the time of its occurrence, notwithstanding defendant continued to occupy the residue of said lots until ———. But if it was the understanding that the plaintiff might put its ——— across the lots in the event of its electing to do so on ———, and defendant held under that understanding, then putting down the ——— after such ——— would not amount to an eviction.[34]

(1744) The court instructs the jury that an eviction which will terminate a tenancy and relieve a tenant from liability for rent, must consist of acts constituting more than a trespass. The acts which will constitute an eviction must be of a grave character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises, and if the jury believe from the evidence that plaintiff during the life of the tenancy of the defendant took possession of the building on the demised premises which had been erected by defendant for purposes of his own and that plaintiff used such building as a "stable" and the premises on which the stable stood as a "cattle yard" without the consent of the defendant, then it is for the jury to say whether these acts amounted to an indication of an intention on the part of the plaintiff that the defendant should no longer continue to hold the premises, and whether these acts therefore constituted an eviction.[35]

[34] Price v. Pittsburg, Ft. W. & C. R. Co., 34 Ill. 13.

[35] Hayner v. Smith, 63 Ill. 430. The question of what constitutes a constructive eviction is for the jury.

Same—Retaking possession of part of premises.

(1745) The court instructs the jury that it is an eviction to take from the tenant some part of the demised premises of which he was in possession; and if the jury in this case believe, from the evidence, that the plaintiff, without the consent of the defendants, took possession of any material part of the demised premises, then the defendants are released from the payment of all rent, and the jury will find for the defendants.[36]

(1746) The court instructs the jury that if they believe, from the evidence in this case, that the premises leased by the plaintiff to the defendants, or a part of the same, were enclosed by a fence, and had on the same a brick building, and that the plaintiff took possession of said building and used it as a stable, and took possession of the yard and used it as a cattle yard, without the consent of the defendants, then, in law, it is an eviction, and releases the defendants from the payment of any more rent; and they will find for the defendants.[37]

(1747) The court instructs the jury that, although they may believe, from the evidence, that the defendants have never been disturbed in, or evicted from the main building on the leased premises, and that they have had the use and enjoyment of the same, still if they further believe from the evidence, that the plaintiff had taken possession of any material part of said demised premises, without the consent of the defendants, then the law is, that it is an eviction, and the defendants are not bound to pay any rent for the part of the said premises they used and occupied; and the jury will find for the defendants.[38]

Same—Lease of part of premises to third person.

(1748) The court instructs the jury that, if they believe,

[36] Approved in Smith v. Wise, 58 Ill. 143.
[37] Approved in Smith v. Wise, 58 Ill. 143.
[38] Approved in Smith v. Wise, 58 Ill. 143.

from the evidence in this suit, that the plaintiff, after leasing the premises to the defendants, leased a part of said premises to one H., who has taken possession of the same, then, in law, this is an eviction, and releases the defendants from the payment of all rent, and the jury will find for defendants.[39]

Action for rent based upon verbal lease.

(1749) The court instructs the jury that plaintiff's action is based upon a verbal lease and the dispute between the parties has relation to the terms on which the land in question was rented to the defendant, each party asserting a number of claims against the other arising under the lease. The court instructs the jury that the terms of the leasing of the plaintiff's farm to defendant are material in this suit and that plaintiff must prove to the satisfaction of the jury by a preponderance of evidence that the terms of the lease were such as plaintiff claimed them to be. If the jury shall find that the evidence preponderates in the slightest decree in favor of the defendant or is equally balanced, then the law is for the defendant and plaintiff cannot recover.[40]

Right to set off value of improvements against rent.

(1750) The court instructs the jury that if they believe from the evidence that by the terms of lease in this case the defendant was to be allowed out of the rent to become due the costs to him of permanent improvements in adapting the building in controversy to his uses, then he had a right to claim the payment of said costs out of said rents. And if they believe from the said evidence that by said contract said defendant was to be paid said costs before paying any rent and was not so paid, then he had the right to claim the same thereafter at any time he might see prop-

[39] Approved in Smith v. Wise, 58 Ill. 143.

[40] East v. Crow, 70 Ill. 91.

er, and if they believe from said evidence that by said contract it was not provided when said costs were to be taken out of the rents, then the defendant had the right to elect to take said costs out of said rent whenever he saw proper so to do.[41]

V. Rights and Liabilities as to Third Persons.

Liability of landlord for injuries to strangers.

(1751) The court instructs the jury that if they believe from the evidence that defendant leased the premises described in the declaration to (A.) and that (A.) took entire possession and assumed entire control over the premises so leased, and that defendant reserved no control over the premises, and that defendant had constructed a vault under the sidewalk adjoining the premises so leased, by the consent of the city and that (A.) was negligent in leaving the vault open, whereby plaintiff sustained the injuries here sued for, then the jury are instructed that defendant is not liable for the injuries so sustained by the plaintiff in so falling into the vault, if the jury find that the injuries were so sustained.[42]

(1752) The court instructs the jury that if they believe from the evidence that the defendant leased the premises described in the declaration to (A.) and that the defendant had knowledge at the time of the leasing, that the premises were in a dangerous condition and constituted a nuisance to the public, and if the jury believe from the evidence that plaintiff was the owner of adjoining premises, and that the dangerous condition of the premises leased by the defendant to A. constituted a nuisance to the plaintiff, and that the plaintiff sustained the personal injuries here sued for on account of the dangerous condition of the premises so leased, then the jury are instructed that it was

[41] Fishburne v. Engledove, 91 Va. 548.

[42] Jennings v. Van Schaick, 108 N. Y. 530.

defendant's duty to enter upon the premises, repair the same or adopt some steps to avoid the danger, and if the jury believe from the evidence that defendant failed to do this, then the jury will find for the plaintiff, if the jury further find from the evidence that plaintiff was not guilty of any lack of reasonable diligence to avoid the injuries alleged to have been sustained.[43]

Liability of tenant for injuries to third persons.

(1753) The court instructs the jury that if they shall find from the evidence in this case, that the defendants entered upon the said demised premises in pursuance of the lease declared on, and which is in evidence, and shall further find that they used and occupied the said premises, and that during said term or tenancy, and while the defendants were so in possession of said premises, they used the said building or warehouse as persons of ordinary care and prudence would have done, looking to its character, size, apparent construction and strength, and that the said house fell down during said tenancy in consequence of some defect in the structure of the same or on account of a want of a proper thickness of the wall, or on account of inferior materials used or on account of the ordinary decay of the materials used in the erection of said building, all of which was unknown to the defendants, and shall further find that the same could not have been discovered by reasonable and ordinary diligence, then the plaintiffs are not entitled to recover in this action, and the verdict must be for the defendants.[44]

(1754) The court instructs the jury that if they find that the injury shown by the evidence to have been sustained by the building in question, occurred while the same was in the occupation of the defendants under a lease

[43] Timlin v. Standard Oil Co., 126 N. Y. 514, 37 State Rep. 906.

[44] Approved in Machen v. Hooper, 73 Md. 342.

offered in evidence and that the said injury is attributed to the alterations made in the building by the defendants in connection with the use thereafter made of it by them, then the plaintiffs are entitled to recover in this action the damages which the jury may find from the evidence they have hereby suffered.[45]

(1755) The court instructs the jury that if they find that the defendants entered into possession of the building in question under the lease in evidence, and made such alterations as they thought fit in order to adapt it to their purpose under the authority given in the lease, and afterwards stored a large quantity of heavy goods therein, and that owing to the excessive quantity of said goods, if they shall find such quantity was excessive, or the manner in which they were stored by the defendants, a large part of the building was caused to fall down, then the plaintiffs are entitled to recover.[46]

Trover by landlord against third persons purchasing grain from tenant.

(1756) The court instructs the jury that if they believe from the evidence that the defendants purchased the grain raised upon the land described in the declaration and alleged to have been rented by A. from plaintiff with notice of the lien of plaintiff upon the grain as landlord of A., then the jury should find for plaintiff, the lien extending to the crop grown for the current year, and the court further instructs the jury that the notice of the lien of the plaintiff upon the crops of his tenants need not necessarily be in writing, and if the jury believe from the evidence that the defendants knew that A. rented from the plaintiff the land on which the grain in controversy was raised, and neglected and failed to inquire into the facts regarding the

[45] Approved in Machen v. Hooper, 73 Md. 342.

[46] Approved in Machen v. Hooper, 73 Md. 342.

plaintiff's lien thereon, to the extent that reasonably prudent men should, under the circumstances, do, then the jury should find for the plaintiff.[47]

CHAPTER LXXXVII.

LARCENY.

Necessity that the article stolen be of value, 1757.
Not necessary that the taking should have been secret, 1758.
Finding of lost goods, 1759.
Same—Owner known at time of finding, 1760.
Same—Intent to steal not existing at the time of finding, 1761.
Necessity of intent to deprive owner of property, 1762.
Same—Taking in jest or for temporary use, 1763.
Same—Intent to hold property for a reward, 1764.
Lucri causi not necessary, 1765.
Subsequent repentance and restitution, 1766.
Taking under claim of right, 1767, 1768.
Carelessness of owner in securing property no defense, 1769.
Genuineness of stolen money must be proved, 1770.
As to the necessity of asportation, 1771.
What is sufficient asportation, 1772, 1773.
Intent to permanently retain property may be inferred from circumstances, 1774.
Necessity of animo furandi at time of taking, 1775.
Fact that goods taken were used in unlawful business no defense, 1776.
Unlawful character of possessor's title no defense, 1777.
Presumption from possession of stolen goods, 1778, 1779.

Necessity that the article stolen be of value.

(1757) The court instructs that it is one of the essentials of the offense charged that the property taken be a thing of value, and unless it shall have been proved that such article was of some value the jury must acquit, but that it was of the slightest value is sufficient.[1]

[47] Prettyman v. Unland, 77 Ill. 206.
[1] Wolverton v. Com., 75 Va. 909.

Not necessary that the taking should have been secret.

(1758) The court instructs that it is not necessary to constitute larceny that the taking should have been done secretly and by stealth. If property is taken openly that fact is to be considered by the jury in determining whether it was taken with an intent to steal or under an honest claim of right, but if the jury are convinced by the evidence beyond all reasonable doubt that the taking was with an intent to steal, the fact that the taking was open is no defense.[2]

Finding of lost goods.

(1759) The court instructs that if the goods with the larceny of which defendant is charged, were lost and were found by him, and he did not, at the time of finding them, know who was the owner, and had no reasonable means then available of discovering the owner, he is not guilty of larceny in taking and retaining the same, though he subsequently discovered the owner and refused to surrender the goods, and though at the time of the finding and taking possession of them he fully intended to appropriate the same to his own use and not to restore them to the owner if he should be subsequently discovered.[3]

Same—Owner known at time of finding.

(1760) The court instructs that if the goods charged to have been stolen were lost and were found by defendant, and that defendant at the time of finding the same knew who was the owner, or had reasonable means of knowing him, as where there were marks upon the property known to him, by which the owner could be ascertained, or other circumstances which would reasonably suggest to him the ownership, and if the jury further believe that at the time of finding and taking possession of such goods the defend-

[2] 2 Clark & M. Crimes, 685.

[3] Bailey v. State, 52 Ind. 466; State v. Dean, 49 Iowa, 73.

ant then appropriated the same to his own use, and did not return them to the owner, he is guilty of larceny.[4]

Same—Intent to steal not existing at the time of finding.

(1761) The court instructs that if the jury believe from the evidence that at the time of finding the goods mentioned in the indictment defendant knew who was the owner thereof, or had reasonable means of discovering the owner, but further believe that at the time of taking possession of the goods defendant did not intend to appropriate them to his own use, but intended to restore them to the owner as soon as opportunity afforded, he is not guilty of larceny, although he afterward, and before he had taken any step toward restoring them to the owner, changed his mind and decided that he would appropriate them to his own use and would not return them.[5]

Necessity of intent to deprive owner of property.

(1762) The court instructs that the mere taking of property with knowledge that it belongs to another is not sufficient to constitute the crime of larceny. Before the defendant can be convicted the jury must be convinced by the evidence beyond all reasonable doubt that in taking the property he then and there intended to deprive the owner of his property and deprive him of it permanently.[6]

Same—Taking in jest or for temporary use.

(1763) The court instructs that to constitute larceny property must be taken with intent to permanently deprive

[4] Com. v. Titus, 116 Mass. 42; State v. Weston, 9 Conn. 526.

[5] Hunt v. Com., 13 Grat. 757; Ransom v. State, 22 Conn. 153. The rule is otherwise by statutes existing in many jurisdictions.

In the last-mentioned case an instruction that if defendant at the time of finding the goods knew or had means of knowing the owner, and did not restore the goods to him, he was guilty of larceny, was held erroneous because not including the essential that the intent to steal must have existed at the time of the taking.

[6] Johnson v. State, 36 Tex. 375.

the owner thereof, and though the defendant had no right to take the property, if he took it merely by way of jest or with intent to use it for a short time and return it to the owner, the taking is not larceny and the jury must acquit.[7]

Same—Intent to hold property for a reward.

(1764) The court instructs that though an intent to deprive the owner of his property is requisite, an intent to deprive him of any part of its value, is sufficient, and accordingly if the jury believe from the evidence that defendant took the property mentioned in the indictment, not with intent to permanently retain it, but with the intent to return it to the owner on the payment of a reward by him for such return, he is guilty of larceny.[8]

Lucri causi not necessary.

(1765) The court instructs that if the taking was with intent to permanently deprive the true owner of his property, it is not essential that it should have been with any intent or expectation of deriving any benefit for the taker, and accordingly if the jury believe that defendant wilfully took and carried away the property mentioned in the indictment, not with intent to appropriate the same to his own use, but with intent to destroy the same out of malice or spite against the owner, he is none the less guilty of larceny.[9]

Subsequent repentance and restitution.

(1766) The court instructs that if the jury believe from the evidence that defendant took or carried away the property mentioned in the indictment with the intention of permanently depriving the owner of his property therein, the

[7] Umphrey v. State, 63 Ind. 223; Cain v. State, 21 Tex. App. 662.

[8] Com. v. Mason, 105 Mass. 163.

[9] Delk v. State, 63 Miss. 77; State v. Ryan, 12 Nev. 401.

fact that he subsequently repented of such design and restored the property, is no defense.[10]

Taking under claim of right.

(1767) The court instructs the jury that though they believe from the evidence that defendant took and carried away the property mentioned in the indictment, and that such property belonged to the person therein stated, yet if defendant in taking such property believed in good faith that he owned the property or had a legal right to take it, he cannot be convicted though his claim of ownership or right was entirely without legal foundation.[11]

(1768) The court instructs the jury that if they believe from the evidence that the defendant took the hogs charged in the indictment, yet that he so took them with an honest belief, although he may have been mistaken in such belief, that he had the right or the authority to so do, or if the evidence on this point is such as to raise in your minds a reasonable doubt as to whether the defendant did believe he had the right to take such hogs, then in such case you will give him the benefit of such doubt and acquit him.[12]

Carelessness of owner in securing property no defense.

(1769) The court instructs that the fact that the owner of the property alleged to have been taken, or his servants, were negligent in their care of the property, and left it exposed to easy access is no defense to one who wrongfully took and carried the same away.[13]

Genuineness of stolen money must be proved.

(1770) The court instructs that the jury must be satisfied by the evidence that the money produced as that al-

[10] State v. Davis, 38 N. J. Law, 176.

[11] Phelps v. People, 55 Ill. 334; People v. Schultz, 71 Mich. 315.

[12] Lawrence v. State, 20 Tex. Ct. App. 536.

[13] Lyons v. People, 68 Ill. 271.

leged to have been stolen, is genuine and not counterfeit, before they can convict.[14]

As to the necessity of asportation.

(1771) The court instructs that before defendant can be convicted of larceny it must be established that with intent to steal he took and carried away the property mentioned in the indictment. Unless the evidence shows that defendant succeeded in actually reducing such property to his possession and carrying it away he cannot be found guilty of larceny.[15]

What is sufficient asportation.

(1772) The court instructs that though it must be shown by the evidence that the property was actually taken and carried away by defendant, it is not necessary that it should have been carried to any particular distance or retained in his possession for any particular length of time.[16]

(1773) The court instructs the jury that the taking of wheat from its place in the granary and filling the same into sacks, and the tying of the sacks so containing such wheat, is a sufficient carrying away to constitute larceny within the meaning of the indictment, if such acts be done with the felonious and unlawful purpose of stealing such wheat.[17]

Intent to permanently retain property may be inferred from circumstances.

(1774) The court instructs that though an intent to permanently retain the property must be established, such in-

[14] Collins v. People, 39 Ill. 233.

[15] Thompson v. State, 94 Ala. 535.

[16] Eckles v. State, 20 Ohio St. 508; Harrison v. People, 50 N. Y. 518.

[17] State v. Hecox, 83 Mo. 531. It was held that these instructions should be accompanied with an instruction submitting the question whether the facts assumed were true.

tent may be inferred from conduct, and if the jury took the property and retained or used it in a manner indicating an intent to permanently retain it, the jury are authorized to infer that he so intended.[18]

Necessity of animo furandi at time of taking.

(1775) The court instructs that to constitute larceny it is necessary not only that defendant should have taken the property willfully without mistake or claim of right and with intent to permanently retain it, but the willfulness and felonious intent must have existed at the time of the taking. If defendant took the property under a claim of right or an honest mistake, or for a jest or for temporary use, he is not guilty of larceny, though he subsequently changed his mind and formed and executed a design to convert it to his own permanent use.[19]

Fact that goods taken were used in unlawful business no defense.

(1776) The court instructs that though the property charged to have been taken was intoxicating liquors kept for sale by the owner, and that the owner had no license to engage in the sale of intoxicants so that the sale thereof by him was unlawful, such fact does not prevent the felonious taking of such liquors from him from being larceny.[20]

Unlawful character of possessor's title no defense.

(1777) The court instructs that if the jury find from the evidence that defendant took the property mentioned in the indictment from the possession of the person charged, it is no defense that such person had acquired his possession thereof unlawfully and had, in fact, no rightful claim to

[18] People v. Phelps, 49 How. Pr. (N. Y.) 437.

[19] Wilson v. People, 39 N. Y. 459. This was the rule at common law, but is changed by statute in many jurisdictions.

[20] Com. v. Coffee, 9 Gray (Mass.) 139.

the possession as against the true owner, provided that defendant was not himself such true owner.[21]

Presumption from possession of stolen goods.

(1778) The court instructs that if the jury believe from the evidence that the property mentioned in the indictment was stolen from the owner, and that shortly thereafter the same was found in the possession of defendant, and defendant has failed to explain how he obtained such possession, his failure to make such an explanation may be considered by the jury and given such weight as they deem proper, in connection with the other evidence tending to show the guilt of defendant (or such possession is prima facie evidence of defendant's guilt unless explained to the satisfaction of the jury).[22]

(1779) The court further instructs the jury that the possession of money by the prisoner, when arrested, cannot be considered as sufficient proof that he stole the same from the firm of S. & H., or that he committed the crime charged in the indictment, but if the jury believe from the evidence that the prisoner did have money on his person when arrested, that is a fact which the jury have a right to consider in connection with all the other evidence adduced before them, and it is for the jury, upon consideration of the whole of the evidence introduced by the commonwealth and for the prisoner, to say whether or not the prisoner is guilty of the crime with which he is charged beyond any reasonable doubt.[23]

[21] Com. v. Rourke, 10 Cush. (Mass.) 397.

[22] The form first given is proper under the rule obtaining in some states (Hall v. State, 8 Ind. 439), while that last given expresses the rule as elsewhere held (State v. Kelly, 57 Iowa, 645).

[23] Henderson v. Com., 98 Va. 794.

CHAPTER LXXXVIII.

LIBEL AND SLANDER.

I. Definition and Elements.

Definition, 1780-1782.
Effect of provocation, 1783.
Words spoken in friendly conversation, 1784.
Certainty—Reference to person slandered, 1785.
Necessity that charge be definite and understood, 1786, 1787.
Publication—Dictation to stenographer, 1788.
Liability of corporation for libel published by its agents, 1789.
Words spoken after date laid in the complaint, 1790.
Province of court and jury, 1791.

II. Charges Actionable Per Se.

Charges of murder, 1792.
Charges of false swearing—Interpretation of language, 1793.
Charge of larceny, 1794.
Imputation of hog stealing, 1795.
Meaning of word "thief," 1796.
Charge of keeping blind tiger, 1797.
Charges detrimental to professional capacity, 1798.
Charges of insolvency or matters injurious to business, 1799.
Charging a woman with lack of chastity, 1800.

III. Privileged Communications.

Matter published in course of judicial proceedings, 1801.
Information in insanity proceedings, 1802.
Definition—Communications between parties in interest, 1803.
Letters written in due course of business, 1804.
Necessity of finding of actual malice where publications are in course of judicial proceedings, 1805.

IV. Justification.

Articles libelous per se—Necessity of justification, 1806.
Necessity of proving guilt beyond a reasonable doubt, 1807.
Sufficiency of evidence to sustain a justification, 1808.
Effect of failure to plead justification—Defenses admissible, 1809.

V. Evidence, Presumptions, and Burden of Proof.

Burden of proof, 1810, 1811.
Same—Elements of offense, 1812.
Presumption of malice, 1813, 1814.
Inference of malice from falsity of charge, 1815, 1816.

Inference of malice where communication is privileged, 1817.
Implication of malice in filing information in insanity, 1818.
Implication of damages, 1819.
Presumption of falsity of charge, 1820, 1821.
Burden of proof of justification, 1822.
Rebuttal of presumption of malice—Mitigation of damages, 1823.
Words imputing larceny—Substantiation of one charge, 1824.
Duty to prove exact words, 1825.

VI. Damages.

Compensatory and exemplary damages, 1826.
Right to punitive damages, 1827.
Effect of bad reputation of plaintiff, 1828.
Unsupported plea of justification, 1829.
Mental suffering and future injury, 1830.
Attendant circumstances operating as mitigation, 1831.
Effect of belief in truth of charge as mitigation of damages, 1832.
Mitigation of damages by showing that charge was a repetition of a rumor, 1833.

VII. Criminal Liability.

Charge that person has been a convicted felon, 1834.
Presumption of malice, 1835.
Burden of proving malice—Definition of malice, 1836.
Right of the jury to judge the law, 1837.
Justification under statute for imputation of unchastity, 1838.

I. Definition and Elements.

Definition.

(1780) The court instructs the jury that our statute defines a libel to be the malicious defamation of a person, made public by any printing, writing, sign, picture, representation or effigy, tending to provoke him to wrath or expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social intercourse, and if, therefore, you believe and find from the evidence that the article admitted to have been published by the defendant corporation of and concerning the plaintiff, had a tendency to provoke him to wrath, or expose him to public hatred, contempt or ridicule or to deprive him of

the benefits of public confidence and social intercourse, then the article in question is libelous under the statute.[1]

(1781) The court instructs the jury that slander may be defined to be the false, willful, and malicious speaking or publishing of another any defamatory words, charging him with being guilty of a felony or crime.[2]

(1782) The court instructs the jury that libel is defined by our statute, so far as applicable to this case, as the malicious defamation of a person, made public by any printing or writing tending to provoke him to wrath, or expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social intercourse.[3]

Effect of provocation.

(1783) The court instructs the jury "that anger is no justification for the use of slanderous words, and it ought not to be considered even in mitigation of damages, unless the anger is provoked by the person against whom the slanderous words were used, and in this case, if the jury believe from the evidence that the defendant spoke of plaintiff any of the slanderous words charged in the petition, then it matters not who commenced the conversation and that the defendant was angry at the time, unless her anger was wrongfully provoked in whole or in part by the acts or language of the plaintiff herself."[4]

Words spoken in friendly conversation.

(1784) The court instructs the jury that confidential communications, made in the usual course of business, or of domestic or friendly intercourse, should be liberally viewed by juries; they should look whether the words were

[1] McCloskey v. Pulitzer Pub. Co., 152 Mo. 339.
[2] Approved in Stallings v. Newman, 26 Ala. 300.
[3] Approved in Dever v. Clark, 44 Kan. 745.
[4] Approved in Boldt v. Budwig, 19 Neb. 739.

spoken with intent to defame, or in good faith to communicate facts interesting to one of the parties.[5]

Certainty—Reference to person slandered.

(1785) The court instructs the jury that it is not necessary in order to make an article libelous and slanderous, that the name of the person should be mentioned, provided such article refers to time, place and other circumstances with such certainty as to enable any person to know to whom the article had reference.[6]

Necessity that charge be definite and understood.

(1786) The court instructs the jury that if the language of the defendant under the circumstances did not charge the plaintiff with larceny and if none of the hearers understood it as charging him with larceny, then the defendant is not guilty.[7]

(1787) The court instructs the jury that ———, the plaintiff, did not commit the crime of larceny in taking this ice and no one now claims in this case that he did. And if defendant's language used on the occasion complained of, taken as a whole and all of it, did not according to its fair meaning under the circumstances charge plaintiff with larceny, or if the hearers did not understand that it charged him with larceny, but that it simply charged him with doing some unfair or improper or dishonest thing, not amounting to larceny, as the hearers understood it, then defendant is not guilty, for then he would not charge plaintiff with crime and the charge of crime is the gist of the alleged slander.[8]

Publication—Dictation to stenographer.

(1788) The court instructs the jury that if they find

[5] Approved in Stallings v. Newman, 26 Ala. 300.

[6] Approved in Houston Printing Co. v. Moulden, 15 Tex. Civ. App. 574.

[7] Approved in Ellis v. Whitehead, 95 Mich. 105.

[8] Approved in Ellis v. Whitehead, 95 Mich. 105.

from the evidence that on the ——— day of ———, 19—, the witness ——— was in the employ of the defendant as a stenographer and typewriter in the office and business of the defendant, and on said day said defendant dictated to the witness ——— the typewritten words and figures in the letter of date of ———, and set out in the first count of the declaration and offered in evidence, and that said witness ——— took down said dictation in shorthand characters upon paper, and thereafter and on the same day copied the same upon a typewriting machine upon the business paper of the defendant, and in the form and manner appearing in said letter offered in evidence, and after said letter was thus typewritten the defendant subscribed his name thereto in his proper handwriting, and thereafter said letter was copied by a letter-press machine into the letter book of the defendant by the witness ——— in the course of her said employment in the business of the defendant, then such action in law constitutes a writing and publication by said defendant of the matters and things appearing in said letter, and if the jury further find that the person therein mentioned and referred to is the plaintiff, then the plaintiff is entitled to recover under the first count of the declaration.[9]

Liability of corporation for libel published by its agents.

(1789) The court instructs the jury that if they find from the evidence that the agent or agents of the defendant corporation showed and exhibited the publication in question to the public or to any individuals constituting the public, but did so without instructions or authority from their principal, the defendant corporation is not responsible for such circulation of the publication.[10]

[9] Approved in Gambrill v. Schooley, 93 Md. 48.

[10] Approved in Schulze v. Jalonick, 18 Tex. Civ. App. 296.

Words spoken after date laid in the complaint.

(1790) The court instructs the jury that in making up their verdict in this case, they must not take into consideration any evidence of any words spoken by defendant after the ——— day of ———, 19—.[11]

Province of court and jury.

(1791) The jury are instructed that they are the sole judges as to whether the article complained of is libelous.[12]

II. Charges Actionable Per Se.

Charges of murder.

(1792) The court instructs the jury that to charge one of murder in killing another is actionable and slanderous, and, falsely and maliciously spoken, warrants a recovery of such damages as the jury may think the party has sustained, commensurate with the injury sustained.[13]

Charges of false swearing—Interpretation of language.

(1793) The court instructs the jury that if they find, from the evidence or the admissions of the defendant in his answer, that the defendant, on or about the day above named in the plaintiff's complaint, did, in the presence of divers persons or even one person, say of and concerning the plaintiff such words as are set forth in the complaint, "that the plaintiff had sworn to a lie," or used such words as amount to charging the plaintiff with swearing falsely, or did utter or publish words of or to or concerning the plaintiff, which in their common acceptation would amount to such a charge, the words are actionable of themselves, and no special damage need be proven, and you will find for the plaintiff. And the words spoken by the defendant of and concerning the plaintiff are to be taken to mean what is apparent the

[11] Approved in Lewis v. McDaniel, 82 Mo. 577.

[12] Approved in McCloskey v. Pulitzer Pub. Co., 152 Mo. 339.

[13] Approved in Stallings v. Newman, 26 Ala. 300.

defendant intended them to mean, according to the common understanding of language in its common acceptation and use.[14]

Charge of larceny.

(1794) The court instructs the jury that if they find from a preponderance of the evidence given in this cause, that the defendant spoke the words, in substance, as alleged in the complaint, that he intended in the use of said words to say and charge that the plaintiff had been guilty of the crime of larceny, and that said words were spoken maliciously and in the presence of some person other than the plaintiff, then they should find for the plaintiff.[15]

Imputation of hog stealing.

(1795) The court instructs the jury that if they believe from the evidence that the defendant spoke of and concerning the plaintiff in the presence and hearing of ———, or others as mentioned, the words in the petition alleged to wit: "——— killed my hogs, and I can prove it, and he is the biggest thief on this creek, and I can prove by ——— and his boys that he has stolen my hogs;" or that enough of the words stated in the petition have been proven to (substantially) constitute the charge imputed to plaintiff, then the jury must find for the plaintiff.[16]

Meaning of word "thief."

(1796) The court instructs the jury that the word (thief) may be so used, qualified or explained as to show that it was intended to have a different and unusual meaning and not to mean larceny or any crime at all.[17]

[14] Approved in Stallings v. Whittaker, 55 Ark. 494.

[15] Approved in Durrah v. Stillwell, 59 Ind. 139.

[16] Approved in Lewis v. McDaniel, 82 Mo. 577. The court intimates that the omission of the word "substantially" would have been preferable.

[17] Approved in Ellis v. Whitehead, 95 Mich. 105.

Charge of keeping blind tiger.

(1797) The court instructs the jury that to carry on what is termed a "blind tiger" in a community where the sale of liquor is prohibited by law is a criminal offense, and a publication charging a person with committing such offense constitutes libel, and would entitle the person thus charged to damages.[18]

Charges detrimental to professional capacity.

(1798) The court instructs the jury that although the plaintiff alleges in his petition that he has, on account of the publications complained of, sustained a damage of one thousand dollars on account of each of said publications, it is not necessary for him to prove any specific damage; for the law presumes the reputation of the plaintiff to be good, as also it presumes that his official duties as a public officer were honestly performed, and his professional obligations properly discharged; and an article which tends to hold him up to the public view as an unskilled lawyer and an incompetent officer, is libelous per se (per se meaning of itself), and entitles the plaintiff to damages, unless the defendant establishes the truth of said publication by a preponderance of the evidence.[19]

Charges of insolvency or matters injurious to business.

(1799) The court instructs the jury that to write or publish anything that imputes insolvency, inability to pay one's debts, the want of integrity in his business, or personal incapacity or pecuniary inability to conduct it with success, or which in any other measure are prejudicial to him in the way of his employment or trade, is libelous per se, if without justification.[20]

[18] Approved in Schulze v. Jalonick, 18 Tex. Civ. App. 296.

[19] Approved in Dever v. Clark, 44 Kan. 745.

[20] Approved in Brown v. Durham, 3 Tex. Civ. App. 244. This must be given in connection with instructions requiring the jury to find the falsity of the charge.

Charging a woman with lack of chastity.

(1800) The jury are instructed that words charging a woman with being a whore are actionable in themselves, and the law presumes that a party uttering them intended maliciously to injure the person against whom they are spoken, unless the contrary appears from the circumstances, occasion or manner of the speaking of the words; but all that the plaintiffs are bound to prove in the case to entitle them to recover, is the speaking by the defendant of enough of the slanderous words charged in the petition to amount to a charge that the plaintiff was a whore, the express malice or ill will need not be proved; but, if the jury believe from the evidence that plaintiff has failed to prove enough of the words to amount to a charge that plaintiff was a whore, then plaintiff cannot recover, and your verdict should be for the defendant.[21]

III. Privileged Communications.

Matter published in course of judicial proceedings.

(1801) The court instructs the jury that if they believe from the evidence that the libelous matter, complained of by the plaintiff, was composed and published in the due course of judicial procedure by the defendants, and that said defendants had reasonable cause for belief, and did actually believe, that the said matter was pertinent to the case they sought to make, and the relief they prayed for, then the jury will find for the defendants.[22]

Information in insanity proceedings.

(1802) The court instructs the jury that the real question for you to determine first in this case is, was the information made by the defendant and filed by him honestly and in good faith, upon probable cause, he believing at the time that the plaintiff was insane, or laboring under an insane delusion, and was the act done for a laudable purpose, to protect him-

[21] Approved in Boldt v. Budwig, 19 Neb. 739.

[22] Approved in Johnson v. Brown, 13 W. Va. 71.

self, his property, or society? And if you find from the preponderance of the credible evidence in the case, that it was so done, then your verdict should be for defendant.[23]

Definition—Communications between parties in interest.

(1803) The court instructs the jury that a communication made in good faith upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty to perform, public or private, moral or social, if made to a person having a corresponding interest or duty, is privileged. Communications within the privilege are not actionable merely because they are false and defamatory, but express malice must be shown.[24]

Letters written in due course of business.

(1804) The court instructs the jury that the letter signed by ———, dated ———, 19—, mentioned in the declaration, was a privileged communication by the defendant for the protection of its own business, and as such the defendant company is not liable in this action; and whether the statements therein contained were true or not, if the jury believe from the evidence that ———, as president of said company, acted without malice in writing and sending said letter to the ——— Company, and for the purpose of collecting the debt therein mentioned, believing the language to be true, then they must find for the defendant.[25]

Necessity of finding of actual malice where publications are in course of judicial proceedings.

(1805) The court instructs the jury that if they believe from the evidence that the libelous matter, complained of by the plaintiff, was regularly composed and published by the defendants in the due course of judicial procedure,

[23] Approved in Comfort v. Young, 100 Iowa, 627. No objection made by appellant.

[24] Approved in Schulze v. Jalonick, 18 Tex. Civ. App. 296.

[25] Reusch v. Roanoke Cold Storage Co., 91 Va. 534.

they will find for the defendants, unless they are satisfied from the evidence that such composing and publishing was done by the defendants with actual malice towards the plaintiff.[26]

IV. JUSTIFICATION.

Articles libelous per se—Necessity of justification.

(1806) The court instructs the jury that both of the articles complained of by the plaintiff in his petition, copies of which articles are attached to said petition, are libelous in themselves and unless the defendant proves them to be true, by a preponderance of the evidence, then the plaintiff would be entitled to recover such damages as he has sustained by the publication of said articles.[27]

Necessity of proving guilt beyond a reasonable doubt.

(1807) The court instructs the jury that evidence introduced under a plea of justification charging the plaintiff with having committed a crime, tending to prove his guilt, but not establishing his guilt beyond a reasonable doubt, cannot constitute a complete defense and bar to the action, but may be considered in mitigation of damages.[28]

Sufficiency of evidence to sustain a justification.

(1808) The court instructs the jury that the testimony, to sustain that plea (justification), should be as certain and conclusive as would be required to justify a conviction for the larceny, if the plaintiff were indicted for the offense,—such as leaves no doubt in the minds of the jury of the truth of the charge.[29]

Effect of failure to plead justification—Defenses admissible.

(1809) The court instructs the jury that in this case there

[26] Approved in Johnson v. Brown, 13 W. Va. 71.
[27] Approved in Dever v. Clark, 44 Kan. 745.
[28] Approved in Tucker v. Call, 45 Ind. 31.
[29] Approved in Wonderly v. Nokes, 8 Blackf. (Ind.) 589.

is no justification pleaded, but only a general denial and a plea of mitigation, and the publication is admitted in the pleadings. Under the evidence and the pleadings the defendant can only mitigate the damages.[30]

V. Evidence, Presumptions, and Burden of Proof.

Burden of proof.

(1810) The court instructs the jury that in this action, to authorize the plaintiff to recover, it is necessary for him to prove that the defendant, maliciously and falsely, spoke, of and concerning the plaintiff, the words charged in his declaration, or some of them; and when plaintiff proves, to the satisfaction of the jury, that defendant, falsely and maliciously, spoke or uttered, of and concerning plaintiff, the words charged in the declaration, then he may recover such damages as he has sustained.[31]

(1811) The court instructs the jury that the defendant is charged by plaintiff with speaking of plaintiff the following words: "J. killed my hogs, and I can prove it; he is the biggest thief on this creek, and I can prove it by M. and his boys that he has stolen my hogs;" and with speaking of plaintiff the following words: "J.'s water gates were traps to steal other people's stock in;" and unless they believe from the evidence that defendant spoke of plaintiff the said words, or so much of the said words as may be sufficient to constitute a charge that the plaintiff stole hogs, or was a hog thief, they must find the issue in this cause for the defendant.[32]

Same—Elements of offense.

(1812) The court instructs the jury that in order to entitle the plaintiff to recover, it must reasonably appear from a preponderance of the evidence, first, that the alleged charge is libelous in its nature; second, that the defendant did pub-

[30] Approved in Jones v. Murray, 167 Mo. 25.

[31] Approved in Stallings v. Newman, 26 Ala. 300.

[32] Approved in Lewis v. McDaniel, 82 Mo. 577.

lish and circulate it as alleged; third, that plaintiff was injured thereby, as alleged.[33]

Presumption of malice.

(1813) The court instructs the jury that if in this case the jury find that defendant spoke the slanderous words as charged in the second and third counts of plaintiff's petition, then the law presumes they were spoken maliciously, and it is not necessary to prove any express malice in order to warrant a verdict for plaintiff.[34]

(1814) The court instructs the jury that malice is essential to the support of an action for slanderous words; but if one, falsely, wrongfully, and willfully charges another with a felony, the law will imply malice until the contrary is shown.[35]

Inference of malice from falsity of charge.

(1815) The court instructs the jury that a man intends the natural consequences of his acts. If, therefore, the jury believe and find from the evidence that the natural consequence of the publication complained of was to defame and injure plaintiff in his reputation and character or expose him to ridicule or contempt, you may properly infer such was the intention of defendant, and if you further believe and find from the evidence that the publication complained of was libelous and false, you may infer that it was maliciously made.[36]

(1816) The court instructs the jury that if they believe from the evidence that the libel alleged to have been published by the defendants concerning the plaintiffs was published in the manner alleged in the declaration, and if they further find that the matter contained in the alleged libel

[33] Approved in Schulze v. Jalonick, 18 Tex. Civ. App. 296.
[34] Approved in Lewis v. McDaniel, 82 Mo. 577.
[35] Approved in Stallings v. Newman, 26 Ala. 300.
[36] McCloskey v. Pulitzer Pub. Co., 152 Mo. 339.

was false, the jury must find for the plaintiffs; and that so far as malice was necessary to a right of action it was properly inferable, from the falsity of the words charged in the complaint as libelous, and the principal question for the jury is as to the truth or falsity of the matter contained in the alleged libel.[37]

Inference of malice where communication is privileged.

(1817) The court further instructs the jury that the letter in question being a privileged communication, malice will not be inferred from its publication by the defendant, but it is incumbent on the plaintiff to prove that the defendant company was actuated by malice against the plaintiff in writing and sending the same to the "——— Company."[38]

Implication of malice in filing information in insanity.

(1818) The court instructs the jury, that if you find that the information was made and filed without probable cause, or without honestly believing that the statements therein were true, but was done to injure the plaintiff in his good name and reputation or for some advantage over him, then the law would imply malice and you should find for the plaintiff.[39]

Implication of damages.

(1819) The court instructs the jury that in actions for slander, the law implies damages from the speaking of actionable words, and if the jury believe from the evidence that the defendant was guilty of the slander alleged in the declaration, then the jury are instructed that the defendant intended the injury the slander was calculated to effect, and

[37] Lewis & Herrick v. Chapman, 19 Barb. 252.

This instruction, of course, is to be given where the matter contained in the alleged libel, is libelous per se.

[38] Reusch v. Roanoke Cold Storage Co., 91 Va. 534.

[39] Approved in Comfort v. Young, 100 Iowa, 627. No objection made by appellant.

the jury will find from all the facts and circumstances in the case what damages ought to be given and are not confined to mere pecuniary loss or injury.[40]

Presumption of falsity of charge.

(1820) The court instructs the jury that slanderous words are presumed to be false until their truth has been proven.[41]

(1821) The court instructs the jury that the charge must be falsely made; but the falsity of the accusation is to be implied until the contrary is shown.[42]

Burden of proof of justification.

(1822) The court instructs the jury that the defendant, as already stated, pleads as a defense, that the matters published by him and complained of by the plaintiff are true, and it devolves upon him to prove, by a preponderance of the evidence, the truth of said matter; and if he has succeeded in establishing the truth of the matter charged as defamatory in the plaintiff's petition, by a preponderance of the testimony, then your verdict must be for the defendant.[43]

Rebuttal of presumption of malice—Mitigation of damages.

(1823) The court instructs the jury that for the purpose of rebutting and repelling the idea of malice, the defendant has the right to prove and explain all the facts and circumstances surrounding the speaking of the words; also, he has the right to show and explain all the facts and circumstances surrounding the speaking of the words in mitigation of damages.[44]

Words imputing larceny—Substantiation of one charge.

(1824) The court instructs the jury that if they find from

[40] Baker v. Young, 44 Ill. 42.
[41] Approved in Tucker v. Call, 45 Ind. 31.
[42] Approved in Stallings v. Newman, 26 Ala. 300.
[43] Approved in Dever v. Clark, 44 Kan. 745.
[44] Approved in Stallings v. Newman, 26 Ala. 300.

the evidence that the defendant spoke of and concerning the plaintiff and of and concerning his character, substantially, any one or more of the sets of words as alleged in the complaint, imputing and charging the crime of larceny against the plaintiff, it was sufficient to sustain the issue as to the speaking of that set of words, and on that issue they should find for the plaintiff.[45]

Duty to prove exact words.

(1825) The court instructs the jury that the plaintiffs are not bound to prove the speaking of the words charged in the petition. If the jury believe from the evidence that the defendant spoke of and concerning the plaintiff, in the presence and hearing of others, any of the slanderous words charged in the petition, the fair import of which would be to charge the plaintiff with being a whore, then she is entitled to a verdict.[46]

VI. DAMAGES.

Compensatory and exemplary damages.

(1826) The court instructs the jury that if they find for the plaintiff, they may award him such sum as under all the facts and circumstances of the case they may deem to be a fair and just compensation to the plaintiff for the injury which they may find he sustained in consequence of the defendant's publication of the letters set out in the declaration; and they may also in their discretion award exemplary or punitive damages as a punishment to the defendant, if they find that the publication proceeded from express malice or ill will to the plaintiff.[47]

Right to punitive damages.

(1827) The court instructs the jury that it stands admit-

[45] Approved in Tucker v. Call, 45 Ind. 31.
[46] Approved in Boldt v. Budwig, 19 Neb. 739.
[47] Approved in Gambrill v. Schooley, 93 Md. 48.

ted that the defendant made the publication set out in plaintiff's petition, of and concerning the plaintiff. Therefore, the court instructs the jury that if you find from the evidence that the publication complained of is libelous and false, you should return a verdict for the plaintiff in such sum as you believe from the evidence, and under the instructions, will be a fair compensation for the injury, if any, naturally and probably done to the plaintiff's reputation and character by the publication in question. And the court further instructs the jury that if you believe from the evidence that the defendant in causing the publication to be made, acted recklessly and in wanton disregard of the plaintiff's rights, then, in addition to the compensation for any actual damage done, you may allow such exemplary or punitive damages as, under the circumstances, you think the defendant should be punished with.[48]

Effect of bad reputation of plaintiff.

(1828) The court instructs the jury that if you believe from the evidence that the plaintiff, at the time of the publication, was of disparaged reputation, then that must be taken into consideration, because a woman whose reputation for chastity is bad, cannot suffer the same damages as a woman of good reputation would, if an article was published about her, reflecting upon her chastity.[49]

Unsupported plea of justification.

(1829) The court instructs the jury that if a material part of a plea of justification fails, the plea fails altogether, and if the defendant in an action of libel, interposed a plea of justification and abandons or fails to prove his plea, such failure to prove, or abandonment of the plea, may be taken into consideration by the jury in estimating damages. It is evidence tending to show malice, and continued malice.[50]

[48] McCloskey v. Pulitzer Pub. Co., 152 Mo. 339.
[49] Approved in Nellis v. Cramer, 86 Wis. 337.
[50] Approved in Downing v. Brown, 3 Colo. 571.

Mental suffering and future injury.

(1830) The court instructs the jury that if, from the evidence, and the instructions of the court, the jury find for the plaintiffs, then the jury are to determine from all the evidence and the circumstances as proved on the trial, what damages ought to be given to the plaintiff, and find their verdict accordingly, but not exceeding the amount claimed. In finding the measure of damages the jury may take into consideration the mental suffering produced, if any, by the uttering of the slanderous words, if they believe from the evidence that such suffering has been endured by the plaintiff, and the present or probable future injury, if any, to the plaintiff's character, which the uttering of the words was calculated to inflict. If you find for the plaintiff, she will be entitled to at least nominal damages without proof of actual damages.[51]

Attendant circumstances operating as mitigation.

(1831) The court instructs the jury that if they find from the evidence that the defendant, uttered the words as set forth in the plaintiff's declaration, then in estimating the amount of damages, they may take into consideration all the attending facts and circumstances under which the defendant made such utterance, in mitigation of the damages; and further, that in estimating the damages the jury may consider the degree of malice on the part of the said defendant.[52]

Effect of belief in truth of charge as mitigation of damages.

(1832) The court instructs the jury that, although you may believe from the evidence that a part or the whole of the article set out in plaintiff's petition, was made to defendant by the wife of plaintiff, and although you may believe from the evidence that the defendant published the same, believ-

[51] Approved in Boldt v. Budwig, 19 Neb. 739.

[52] Approved in Padgett v. Sweeting, 65 Md. 404.

ing, in good faith, that the same was true, yet (if you believe the article thus was false and libelous), the court instructs you that the defendant's good faith or belief in the truth of said article does not constitute a defense in his case, but the jury should consider the same in mitigation of damages.[53]

Mitigation of damages by showing that charge was a repetition of a rumor.

(1833) The court instructs the jury that if defendant at the time he spoke the words complained of, stated that he had heard such a report from others and gave it as a matter of rumor, and he has proved that he heard it, then while it would not amount to a justification, for no one has a right, even through idle wantonness, to keep a slanderous report afloat against another, yet it may be considered as tending to show that he did not originate the story in malice, and given its due weight in mitigation of damages.[54]

VII. Criminal Liability.

Charge that person has been a convicted felon.

(1834) The court instructs the jury that to print and publish concerning any person that he has been a convict in the state penitentiary of the state of Kansas, is libelous per se, unless the same is true; and in this connection, further instruct you that there was no attempt on the part of the defendant in this case to prove the truth of the matter charged as libelous, or to show that the same was published for justifiable ends.[55]

Presumption of malice.

(1835) The court instructs the jury that malice does not

[53] McCloskey v. Pulitzer Pub. Co., 152 Mo. 339. The modification of above instruction by insertion of words in brackets approved.

[54] Approved in Hinkle v. Davenport, 38 Iowa, 355.

[55] Approved in State v. Brady, 44 Kan. 435.

mean a personal ill will toward a person libeled. If the publication be found libelous, the law implies malice. If the publisher published carelessly, not knowing or indifferent what, he is held responsible as though he read every word. It is a settled principle of law that every person is presumed to intend the reasonable and natural consequences of his own act; so, as I have said, if you are satisfied that the defendant published the newspaper article set out in the indictment, and that it was false and scandalous, you are obliged to presume that it was done maliciously and willfully, with intent to injure and defame.[56]

Burden of proving malice—Definition of malice.

(1836) The court instructs the jury that the burden is thrown on the state to show affirmatively that the communication was made with malice, that is to say, not from a sense of duty, but from a dishonest motive. If the defendant honestly believed it to be his duty to make the communication, and did so under a sense of duty only, he is not guilty. If, on the other hand, his motives were not good, if the communication was not made for a justifiable end, but from malice, to gratify a feeling of revenge for supposed injury, then he is not justified, and he should be found guilty.[57]

Right of the jury to judge the law.

(1837) The court instructs the jury that our law provides that in all prosecutions for libel, the jury, after receiving the directions of the court, shall have the right to determine, at their discretion the law and the fact. In construing this law, you are instructed to review carefully the whole case, looking to these instructions for the law and to the evidence for the facts, and after both and all, then with a rigid regard for the rights of the people and those claimed to be injured on the one hand, and as rigid and watchful

[56] Approved in State v. Mason, 26 Or. 273.

[57] Approved in Haase v. State, 53 N. J. Law (24 Vroom) 34.

care for the rights of the defendant on the other, seek to determine the truth of the issue. As to the right of the jury to determine the law and the fact, you are instructed that if the jury can say on their oaths that they know the law better than the court does, they have the right to do so, but before assuming so solemn a responsibility they should be sure that they are not acting from caprice and prejudice, that they are not controlled by their will or their wishes, but from a deep and confident conviction that the court is wrong, and that they are right. But saying this on their oaths, it is their duty to reflect whether, from their habits of thought, their study and experience, they are better qualified to judge of the law than the court. If, under all these circumstances, they are prepared to say that the court is wrong in its exposition of the law, the statute has given them that right.[58]

Justification under statute for imputation of unchastity.

(1838) The court instructs the jury that the defendant may prove in justification that the particular imputation which he made against the female was true, and that her general reputation for chastity, at the time the imputation was made, if any, was bad, and if an inquiry into the reputation of the female establishes that such reputation was, at the time, bad, the defendant is entitled to an acquittal.[59]

CHAPTER LXXXIX.

LIMITATION OF ACTIONS.

Period of limitation—Rendition of services, 1839-1841.
When the statute begins to run as against beneficiaries, 1842.
Effect of infancy and absence from state, 1843.
Fraudulent concealment of cause of action as affecting running of statute, 1844.

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[58] State of Iowa v. Heacock, 106 Iowa, 191.

[59] Approved in Collins v. State, 39 Tex. Cr. App. 30.

Effect of amendment of pleading making charge of negligence more specific, 1845.
Mutual accounts, 1846.
Counterclaim, 1847.
Part payment to extend the statute, 1848.
Acknowledgment of indebtedness, 1849, 1850.
Burden of proof of new promise, 1851.
Effect of new promise on action for breach of promise of marriage, 1852.
Crediting on account to extend statute, 1853.

Period of limitation—Rendition of services.

(1839) The court instructs the jury that if you believe from the evidence in this case that the plaintiff rendered services for the defendant more than (statutory term) years before the beginning of this suit on ——— day of ———, 19—, and since that time there had been no new promise or express promise on the part of the defendant to pay for such services or any unqualified admission by him that the debt therefor was due and unpaid, the plaintiff cannot recover for such services rendered more than (statutory term) years before the beginning of the suit.[1]

(1840) The court instructs the jury that if they are satisfied by a preponderance of the evidence in the case that the work and labor sued for was done under an agreement or understanding that the same was to be paid for, as explained in these instructions, and that said work and labor was continued to be performed until within six years before the commencement of this suit, the suit would not be barred by the statute of limitations.[2]

(1841) The court instructs the jury that if they believe from the evidence that some portion of plaintiff's claim for services accrued more than three years before the institution of this suit, then the plaintiff cannot recover for such portion under the pleadings in this cause, unless they shall further find that the defendant or his testatrix promised to

[1] Approved in Miller v. Cinnamon, 168 Ill. 447.
[2] Approved in Story v. Story, 1 Ind. App. 284.

pay the same within (the statutory period) before the bringing of this suit.[3]

When the statute begins to run as against beneficiaries.

(1842) The court instructs the jury that if they find from the evidence that the warrant was issued to the defendant under an agreement that he would transfer it to the plaintiff when it was issued, then the defendant held such warrant in trust for the plaintiff, and the statute of limitations would not commence to run against him until he had actual or constructive notice of the adverse claim of the defendant. The possession of the trustee is not per se inconsistent with that of the cestui que trust or beneficiary of the trust. Unless the jury believe from the evidence that the defendant has shown that no consideration passed for the certificate, you will find for the plaintiff; but, in that event, you will find for the defendant.[4]

Effect of infancy and absence from state.

(1843) The court instructs the jury that the facts in the case show that the plaintiff P., is the only one of the plaintiffs who was within the protection of the disability statute; that at the time the cause of action accrued she was under the protection of two disabilities, one of infancy, which long ago terminated, and absence from the state. It is a conceded fact that while still an infant, a nonresident, and absent from the state, and after the death of said infant, and after said will was probated, she, in control of a person standing in loco parentis to her, came within the state of ——— for the purpose of passing through it to acquire a new residence in another state; that she remained in this state the period of twenty days and then went from it and continued absent therefrom continuously up to the time named in the petition, but a greater period than the period of two years.

[3] Approved in Bouic v. Maught, 76 Md. 440.

[4] Smithwick v. Andrews, 24 Tex. 488.

The court, therefore, directs you, as a matter of law, that upon her coming bodily within this state, although an infant and coming involuntarily, that the disability provided in the statute as to absence from the state was taken away from her; and a greater period having elapsed from the beginning of the running of the statute than two years, that she is not entitled under the law to maintain this action.[5]

Fraudulent concealment of cause of action as affecting running of statute.

(1844) The court instructs the jury that if you believe from the evidence that a relation of trust and confidence existed between the parties to the action, and that defendant acting as plaintiff's agent collected the full amount of the policy of insurance held by plaintiff, and you believe from the evidence that said defendant accounted with plaintiff for a portion of the amount collected and concealed from plaintiff the fact that he had collected the entire sum, and you believe from the evidence that defendant stated to the plaintiff that he had been required to take the less amount in satisfaction of the entire claim, and that plaintiff relying on said statements believing them to be true made no examination to discover whether the statements were true or false, and did then and there accept the lesser sum in full of his claim, then you are instructed that the concealment was a fraudulent one, and that the statute of limitation did not commence running against said cause of action so concealed until the claimant discovered or might by reasonable diligence on his part have discovered that the cause of action for the entire amount existed in his favor, and you will find for plaintiff.[6]

Effect of amendment of pleading making charge of negligence more specific.

(1845) The court instructs the jury that the express and

[5] Approved in Powell v. Koehler, 52 Ohio St. 103.

[6] Vigus v. O'Bannon, 118 Ill. 334.

specific allegations in plaintiff's amended petition with respect to the horses hitched to the defendant's car do not change the cause of action originally sued on, and the defense of the statute of limitations set up in the defendant's answer should be disregarded by the jury.[7]

Mutual accounts.

(1846) The court instructs the jury that an open, that is, an unsettled and mutual account current, is an account consisting of credit as well as debit charges between the parties. An account in which A. charges B. with a number of items extending through a considerable time but in which B. has no credits is not a mutual account current between the parties.[8]

Counterclaim.

(1847) The court instructs the jury that where a counter-claim is set up it must be proven that the plaintiff's action was instituted (here insert the statutory time) and the law holds that in a case of this kind you cannot go further than (here insert the statutory time) years from the commencement of the action, therefore I charge you as a matter of law that you are bound by the fact that in considering the defendant's counterclaim you cannot go back further than (here insert the statutory time).[9]

Part payment to extend the statute.

(1848) The court instructs the jury that in order to make a money payment a part payment to extend the statute, the burden is on the creditor to show that it was a payment of a portion of the admitted debt, and it was paid to and accepted by him as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to

[7] Dougherty v. Missouri River R. Co., 97 Mo. 647.
[8] Dunn v. Estate of Fleming, 73 Wis. 545.
[9] Chapman v. Chapman, 31 S. C. 405.

pay the remainder, and you are further instructed that a part payment of a debt is not of itself conclusive to take the case out of the statute. In order to have that effect it must not only appear that the payment was made on account of a debt, but also on account of the debt for which the action was brought, and that payment was made as a part of a larger indebtedness, and under such circumstances as will warrant a jury in finding an implied promise to pay the balance.[10]

Acknowledgment of indebtedness.

(1849) The court instructs the jury that if you find from the evidence in this case that the note in suit was executed by the defendant on the ——— day of ———, 19—, and you further find that since the execution of said note, and within the ten years prior to the bringing of this suit, the defendant, in writing, acknowledged indebtedness due from him to the plaintiff, then and in that event your verdict should be for the full amount due upon said note, after allowing the credit indorsed on the back thereof.[11]

(1850) The court instructs the jury that if you find from the evidence that the defendant within (here insert the statutory time) years after the debt became due, acknowledged or admitted the same, and within (here insert the statutory time) years after the first acknowledgment again acknowledged and admitted the debt, and that the two acknowledgments occurred within (here insert the statutory time) years of each other and the last acknowledgment within (here insert the statutory time) years before the bringing of the suit in this case, then the debt sued on in this case was not barred and the verdict must be for the plaintiff for the full amount of the debt with interest to date, there being no uncertainty about the debt and the amount due, and the acknowledgment being clearly, distinctly and unequivocally

[10] Crow v. Gleason, 141 N. Y. 489.

[11] Approved in Parks v. Woods, 89 Iowa, 743.

a consideration with an intention or promise to pay the debt.[12]

Burden of proof of new promise.

(1851) The court instructs the jury that there is but one question for you to determine in this cause, that is, did the defendant in this cause within six years prior to ——— day of ———, 19—, promise positively and unconditionally to pay the note sued on in this action; as to this issue the burden is on the plaintiff, and if he fails to make out said issue by a preponderance of the evidence, then you shall find for the defendant. If the plaintiff so establishes this issue by a preponderance of the evidence then you should find for the plaintiff.[13]

Effect of new promise on action for breach of promise of marriage.

(1852) The court instructs the jury that if there was an agreement to marry and the time for its consummation postponed from time to time by defendant until a period less than (statutory term) years prior to the commencement of this suit when defendant refused to marry plaintiff, and plaintiff was ready and willing to marry him, then this suit would not be barred by the statute of limitations.[14]

Crediting on account to extend statute.

(1853) The court instructs the jury that if you find there was no understanding or agreement in regard to the credit of the ——— dollars, then it does not avail as a payment to take this claim out of the statute of limitations and prevent its being barred, because the parties must agree upon the payment. The plaintiff cannot, by giving credit upon an account,—upon an outlawed bill, or a bill that may be outlawed,—for the purpose of preventing the running of the

[12] Detzel v. Schonmaker (Pa.) 11 Atl. 637.

[13] Approved in Sears v. Hicklin, 3 Colo. App. 331.

[14] Chamness v. Cox, 131 Ind. 118.

statute, make a credit, of his own volition, on that account, and save the running of the statute. He cannot do it unless it is agreed between the parties that there is to be an application upon the account; and that is a question for you to determine, whether or not it was understood between the parties that such credit was to be made to ———, and that it was to be credited upon that account, and properly applied upon it. If it was so understood between them, it would be a proper application, and the plaintiff might maintain this action; otherwise he cannot,—and that is the question for you to determine.[15]

CHAPTER XC.

MALICIOUS PROSECUTION.

Malice, 1854, 1855.
Probable cause, 1856-1864.
Advice of counsel, 1865-1868.
Liability of partner for act of co-partner, 1869.

Malice.

(1854) The court instructs the jury that the plaintiff claims that the defendant, occupying the position of alderman in the city of ———, abused the powers conferred upon him by the laws of this state, by causing the plaintiff to be arrested upon a charge which the defendant knew to be baseless, or at least had no reasonable grounds for believing it to be true, and after the defendant's arrest by refusing him an opportunity to obtain bail and confining nim in the ——— county prison. The court instructs the jury that if they are satisfied from a fair preponderance of the evidence that both or either of these allegations are true, then the plaintiff is entitled to recover. In other words, if the jury believe from a fair preponderance of the evidence that the defendant

[15] Approved in Bay City Iron Co. v. Emery, 87 N. W. 652.

instituted this prosecution, knowing it to be baseless, or having no reasonable ground for believing it to be true, or if the jury believe, from a fair preponderance of the evidence that the defendant when the plaintiff was arrested and brought before him refused or threw obstacles in the way of his obtaining bail, and committed him to prison without the opportunity of obtaining bail, in either of these cases and in both of these cases, the verdict of the jury will have to be in favor of the plaintiff.[1]

(1855) The court instructs the jury that if you believe from the facts and circumstances as given in evidence that the defendant had not probable cause for the arrest and imprisonment of the plaintiff, then you are at liberty to infer malice from such want of probable cause, if you believe from the evidence that there was want of probable cause.[2]

Probable cause.

(1856) The court instructs the jury that the statute of this state provides that if two or more persons actually do an unlawful act with force or violence against person or property of another, with or without a common cause or quarrel or even do an unlawful act in a violent or tumultuous manner, such persons so offending shall be guilty of a riot, and if the jury believe from the evidence that the plaintiff was in possession of cattle as he supposed rightfully, and that he was accosted in the highway while so in possession of the cattle, and the cattle were wrested from his possession by the defendant with strong hands, and with tumult and violence, then he had a right to suppose that a criminal offense had been committed and had a right to complain of it.[3]

(1857) The court instructs the jury, for defendant, that if they believe, from the evidence, that the defendant had probable cause to institute the criminal proceedings against

[1] Approved in Grohman, by next friend, v. Kirschman, 168 Pa. 189.
[2] Approved in Roy v. Goings, 112 Ill. 656.
[3] Murphy v. Martin, 58 Wis. 276.

the plaintiff, then the plaintiff cannot recover. Probable cause is defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense of which she is charged.[4]

(1858) The court instructs the jury that if they believe from the evidence that the plaintiff willfully and maliciously set fire to and burned about ——— shocks of corn belonging to the defendant, as stated in the complaint, under oath, of the defendant, read in evidence to the jury, in this case on behalf of the plaintiff, then, and in such case, the defendant had probable cause for the procuring of the plaintiff to be arrested on a charge of malicious mischief, and the jury should find the defendant not guilty.[5]

(1859) The court instructs the jury, for the defendant, that the burden of proof in this case is upon the plaintiff to show that the defendant, in instituting the prosecution before ———, a justice of the peace, for malicious mischief, acted without probable cause, and if they believe, from the evidence, that the plaintiff had failed to show a want of such probable cause by a preponderance of testimony, then the jury will find for the defendant.[6]

(1860) The court instructs the jury that if they believe from the evidence that the defendant, when he instituted the prosecution complained of, honestly believed the plaintiff was guilty of the offense charged, and the defendant's belief was founded on a knowledge of circumstances tending to show guilt, and sufficient to induce in the mind of an ordinarily reasonable cautious man the belief in such guilt, then such belief on the part of the defendant negatives the idea of the want of probable cause.[7]

[4] Approved in Calef v. Thomas, 81 Ill. 478.
[5] Calef v. Thomas, 81 Ill. 478.
[6] Approved in Calef v. Thomas, 81 Ill. 478.
[7] Schattgen v. Holnback, 149 Ill. 646.

(1861) The court instructs the jury that if they believe from the evidence, that the defendants, or either of them testified before the magistrate to facts particularly within their knowledge, in the communication of the charge made by them against the plaintiff, that plaintiff had agreed to assume and pay the debt of ———, and if they further believe that said defendants, in good faith, believed that the plaintiff had so agreed to pay and assume the same, then the testimony so given by said defendants, or either of them, is evidence in this case as to the existence of the probable cause for making the criminal charge complained of by the plaintiff.[8]

(1862) The court instructs the jury that if they believe from the evidence, that the plaintiff was then and there, and had been several years, cashier for defendants, when he paid himself the money for his services rendered them, and that he had often done so before, with their knowledge and assent, he crediting them and charging himself for the same on their books, kept for the purpose, and when told by one of them he must return the money, or they would have him arrested for stealing it, he claimed his right to pay it to himself; all of which, if the jury find from the evidence, the defendants knew when they caused his arrest, then, and in such case, there was no probable cause for the arrest.[9]

(1863) The court instructs the jury that if they believe from the evidence, that the defendant had given to plaintiff, a bond for the conveyance of land, which was to be void upon the failure of plaintiff to comply with certain conditions therein named, and those conditions were not complied with by plaintiff and therefore the bond had become forfeited and void, and had been delivered up to defendant by plaintiff or his agent, and that previous to such delivery, plaintiff had copied such bond or written one of similar import, signing

[8] Ross v. Innis, 26 Ill. 260.
[9] Ross v. Innis, 26 Ill. 260.

defendant's name thereto or caused the same to be done, with intent to assert rights under said bond, to the damage or prejudice of the rights of defendant,—such conduct on the part of plaintiff may be considered by you in passing on the question of whether defendant had reasonable and probable cause to procure the arrest of plaintiff on a charge of forgery.[10]

(1864) The court instructs the jury that if they believe from the evidence that the plaintiff up to the time of his arrest uniformly bore a good reputation for honesty and integrity, and that the defendant knew his reputation to be such up to the time of his arrest, then that fact is a proper one to be considered by the jury, in connection with all the other evidence in the case, in determining whether or not the defendant had probable cause to believe, and did believe, in good faith, that the plaintiff was guilty of the crime charged against him.[11]

Advice of counsel.

(1865) The court instructs the jury that before defendant can shield himself under the plea that before instituting the prosecution alleged in the declaration, he took advice of counsel, it must appear from the evidence that he made in good faith a full, fair and honest statement of all the material circumstances bearing upon the supposed guilt of the plaintiff which were within the knowledge of the defendant, or which the defendant could, by the exercise of ordinary care have obtained, to a respectable attorney in good standing and that the defendant acted in good faith upon the advice of such attorney in instituting and carrying on the prosecution against the plaintiff.[12]

(1866) The court instructs the jury that in order to render the advice of counsel any protection to the defendants in this action, the jury must be satisfied from the evidence, that

[10] Davie v. Wisher, 72 Ill. 262.

[11] Jones v. Morris, 97 Va. 43.

[12] Approved in Roy v. Goings, 112 Ill. 656.

such advice was sought in good faith, and that a fair, full and true statement of all the facts were then submitted to the counsel, and that they, in instituting the prosecution, were induced to act, and acted on such advice without a previous determination to prosecute the plaintiff, whether so advised or not.[13]

(1867) The court instructs the jury that if they believe from the evidence, that the defendants made the charge of embezzlement falsely, maliciously and without probable cause, to destroy the plaintiff's reputation for honesty in ———, and to prevent his getting employment in ———, and that they obtained the opinion of counsel upon a false or partial statement of facts, as they understood them, then such opinion, if so obtained, would offer no protection to them and the plaintiff, in such case, ought to recover, and the jury, in such case, may give exemplary damages.[14]

(1868) The court instructs the jury that the burden of proof is upon the defendant to prove that he sought counsel with an honest purpose to be informed as to the law, and that he was in good faith guided by such advice in causing the arrest of the plaintiff, and that whether or not the defendant did, before instituting the criminal proceedings, make a full, correct and honest disclosure to his attorney or attorneys of all the material facts bearing upon the guilt of the plaintiff, of which he had knowledge, and whether, in commencing such proceedings, the defendant was acting in good faith upon the advice of his counsel are questions of fact to be determined by the jury, from all the evidence and circumstances proved in the case. And if the jury believe, from the evidence, that the defendant did not make a full, correct and honest disclosure of all such facts to his counsel, but that he instituted the criminal prosecution from a fixed determina-

[13] Ross v. Innis, 26 Ill. 260.

[14] Ross v. Innis, 26 Ill. 260.

tion of his own, rather than from the opinion of counsel, then such advice can avail nothing in this suit.[15]

Liability of partner for act of co-partner.

(1869) The court instructs the jury that if R. became acquainted with the facts in the matter about the ———, that being so informed as to said facts attending the commencement of said proceeding, said R. suffered said proceedings to be continued in the courts, and did not in any way discountenance said proceedings or put a stop to the same, and if they find, from the evidence, that said proceeding was instituted maliciously and without probable cause, and said R. was so informed, but allowed the case to proceed, then all such facts, if the jury so believe, may be taken into consideration in determining whether said R. ratified and approved of the arrest of plaintiff, and if he did so approve and ratify the arrest of plaintiff, then he would be equally liable with his copartner, W., if said arrest was made maliciously and without probable cause.[16]

CHAPTER XCI.

MARRIAGE.

Common-law marriage as defense to bastardy proceeding, 1870.

Common-law marriage as defense to bastardy proceeding.

(1870) The court instructs the jury that, if they believe from the evidence that ——— and ——— entered into a marriage contract by and between themselves in good faith, and accepted each other as husband and wife, they should return a verdict of not guilty. The contract must have been made before the intercourse when the child was conceived, and both parties must have understood the agreement was in

[15] Approved in Jones v. Morris, 97 Va. 43.

[16] Approved in Rosenkrans v. Barker, 115 Ill. 331.

place of a marriage ceremony. If the prosecuting witness did not understand the agreement to be all that was necessary to constitute a valid marriage, then there was no valid marriage. There was no valid marriage unless both parties acted in good faith, and each intended thereby to become husband and wife.[1]

CHAPTER XCII.

MASTER AND SERVANT.

I. Relation in General.
Implication of competency of servant, 1871.
Action for wrongful discharge, 1872-1875.

II. Nature and Extent of Master's Liability in General.
Care required in general, 1876-1879.
Master as insurer, 1880, 1881.

III. Tools, Machinery, Appliances, and Places to Work.
Care required of master, 1882-1884.
Duty to furnish latest or best tools or appliances, 1885-1893.
Delegation of duty, 1894, 1895.
Defects in appliances and machinery in general, 1896, 1897.
Defects in tools or appliances furnished or manufactured by third persons, 1898.
Rolling stock, appliances, and tracks of railroad, 1899-1906.
Same—Tracks and switches, 1907, 1908.
Same—Hand-cars, 1909.
Platforms, scaffolds, and supports, 1910-1913.
Care required in regard to places provided for escape in case of fire, 1914.
Care as to elevators, 1915.
Inspection by master and knowledge of defects, 1916-1920.
Duty of master to keep machinery, tools, and appliances in repair, 1921, 1922.
Latent defects, 1923-1925.
Improper use of tools, appliances, or places furnished by master, 1926.
Tools, appliances, or places selected by servant, 1927.

IV. Methods of Work, Rules, and Orders.
Methods of work, 1928-1931.
Duty to promulgate rules, 1932.

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[1] Baird v. People ex rel. Wenderlandt, 66 Ill. App. 671.

V. Warning and Instructing Servant.
Duty to acquaint servant with dangers of employment, 1933.
Methods of handling explosives, 1934.
Instructions to be given to young and inexperienced employees, 1935.

VI. Fellow Servants.
In general, 1936.
Number and efficiency, 1937-1939.
Difference in character of work as determining relation, 1940-1944.
Same—Engineer and brakeman, 1945.
Vice principals and persons engaged in superintendence, 1946-1948.
Same—Conductor and brakeman, 1949.
Same—Section foreman and laborer, 1950.

VII. Risks Assumed by Servant.
Nature and extent in general, 1951-1956.
Compensation as consideration for risks and dangers, 1957, 1958.
Right of servant to rely on care of master, 1959-1962.
Dangers known to servant and obvious and latent defects, 1963-1969.
Same—Operation of railways, 1970-1979.
Same—Minority of servant, 1980.
Promise of master to remedy defect, 1981.
Negligence of fellow servant, 1982.

VIII. Contributory Negligence of Servant.
Care required of servant in general, 1983-1989.
Knowledge of defects or dangers, 1990-1994.
Injury to servant where absent from post of duty, 1995-1997.
Disobedience of rules and orders, 1998-2000.
Disregard of warning, 2001.

IX. Evidence to Establish Liability.
Burden of proof, 2002-2007.
Sufficiency of evidence, 2008.

X. Liability for Injuries to Third Persons.
In general, 2009-2013.

I. Relation in General.

Implication of competency of servant.

(1871) When plaintiff sought employment at the hands

of defendant he was held to an implied representation that he was competent to perform the duties of the position he sought and competent to apprehend and avoid all danger that might be discovered by the exercise of ordinary care and prudence, and for the purposes of this case plaintiff is to be treated as a brakeman and switchman of ordinary experience and skill.[1]

Action for wrongful discharge.

(1872) The court instructs the jury that if they shall believe from the evidence that the defendant before the institution of this suit made the contract shown in evidence by which it employed the plaintiff, and that by the terms of said contract, the plaintiff was to act as ——— for the term of ——— from the ——— of ———, 19—, at a salary of ———, and that plaintiff entered into the discharge of his duties as prescribed in the contract and did faithfully and efficiently perform the duties of his position and give his entire time and attention thereto and that plaintiff offered to serve the defendant in the position which he was to fulfill under the contract for the prescribed term, but defendant refused to allow the plaintiff so to do and discharged him from his services before the expiration of the prescribed term, then the verdict of the jury must be for plaintiff.[2]

(1873) The court instructs the jury that although a good cause for the discharge of the servant existed at the time of his discharge, and was not known to the master at the time, nevertheless he may avail himself of this cause as a defense to this action.[3]

(1874) The court instructs the jury that on the pleadings and evidence, even if they find that plaintiff was discharged on the ———, yet, if they further find that whatever trouble

[1] Approved in Pennsylvania Co. v. McConnack, 131 Ind. 250.

[2] Equitable Endowment Ass'n v. Fisher, 71 Md. 430.

[3] Approved in Crescent Horse-Shoe & Iron Co. v. Eynon, 95 Va. 151.

or difficulty then existed was smoothed over and settled and it was arranged that plaintiff should go back to his work, and that plaintiff did thereupon return to his service under said contract to said defendant and so continued for several weeks and drew his salary of ——— per week until ———, then the affair of ——— is not to be regarded so far as the same relates to the period or fact of discharge sued on.[4]

(1875) The court instructs the jury that if the plaintiff without excuse conducted himself generally toward his superior officer and coemployes in such a way as to interfere with the harmonious transaction of business and to render it injurious to the interest of the defendant to retain him in its service, then the defendant had the right to discharge him and he is not entitled to recover.[5]

II. Nature and Extent of Master's Liability in General.

Care required in general.

(1876) The court instructs the jury that to entitle the plaintiff to recover in this action, the plaintiff must show to the satisfaction of the jury, or else it must otherwise appear in the evidence to the satisfaction of the jury, that the deceased was injured by the negligence of the defendant, whilst the deceased was observing ordinary care on his part to avoid injury, or did not by his own negligence contribute to the injury.[6]

(1877) The court instructs the jury that if they believe from the evidence that the plaintiff was employed to work for the defendant as stated in the declaration and that while he was engaged in the duties of such employment, he was injured and sustained damage as complained of in the declaration; that the defendant was negligent in the respect charged in the declaration, and that the injury complained of in the

[4] Approved in Equitable Endowment Ass'n v. Fisher, 71 Md. 430.
[5] Approved in Equitable Endowment Ass'n v. Fisher, 71 Md. 430.
[6] Approved in Way v. Illinois Cent. R. Co., 40 Iowa, 341

declaration was caused by the said negligence of the defendant as charged in the declaration, and that the plaintiff at the time of the injury was in the exercise of due care and caution for his own safety, then you will find for the plaintiff.[7]

(1878) The court instructs the jury that unless you believe that plaintiff was injured as he alleged by reason of the negligence, such as alleged in his petition (if any) of the defendant company, and without negligence on his part causing or contributing thereto and concurring therein wholly or partly, as above instructed, and unless you believe that the injury was not caused by a risk ordinarily incident to the employment in which he was engaged, you will find for the defendant.[8]

(1879) The court instructs the jury that the measure of care which should have been taken by the defendant company to avoid a responsibility of the injury to the said plaintiff is that which a person of ordinary care, prudence and caution would use if his own interests were to be affected, or the whole of the risk were his own. It is such care as a person of ordinary prudence would exercise under the circumstances surrounding the injury.[9]

Master as insurer.

(1880) The court instructs the jury that a railroad company is not an insurer of the lives and limbs of its servants, and it cannot be held liable for an injury sustained by its servants, unless it was guilty of some act of negligence which resulted in the injury, and which was not contributed to by the carelessness or negligence of the servant himself.[10]

[7] Heldmaier v. Cobbs, 195 Ill. 172

This instruction cannot be criticised on the ground that it ignores any defense which the defendant may have; such an objection can be made only where the court undertakes to state the facts which, if proved, will entitle the plaintiff to recover.

[8] Approved in International & G. N. R. Co. v. Emery, 40 S. W. 149.

[9] Approved in McVey v. St. Clair Co., 49 W. Va. 412.

[10] Approved in Baltimore & O. S. W. Ry. Co. v. Spaulding, 21 Ind. App. 323.

(1881) The court instructs the jury that the defendant was not an insurer of the life or safety of the plaintiff while he was at work for it; and if you believe from the evidence that this fall was an accident for which no one was to blame, or that it was the result of the carelessness or negligence of the plaintiff or of some fellow servant, then your verdict should be for defendant.[11]

III. Tools, Machinery, Appliances, and Places to Work.

Care required of master.

(1882) The court instructs the jury that it was the duty of defendant to use all reasonable precautions for the safety of its employees, and among other things it was bound to furnish suitable machinery—materials sound, safe—and to keep it in such condition as would not endanger their safety; such as was least likely to do or cause injury.[12]

(1883) The court instructs the jury that the defendant company was bound to use ordinary care in supplying and maintaining proper instrumentalities for the performance of the work required, and generally to provide for the safety of the servant in the course of the employment, and if it failed in the performance of its duty in this particular, it is liable to its servant as it would be to a stranger, if such servant himself was without fault which proximately contributed to his death.[13]

(1884) The court instructs the jury that the fact that an injury has resulted from an act or omission of the employer, is not enough to render the employer liable; the employe must go further and show that the act or omission complained of was such as a prudent employer, having due regard to the hazards of the business, would not do or omit.[14]

[11] Approved in Doyle v. Missouri, K. & T. Trust Co., 41 S. W. 255.
[12] Approved in Cooper v. Central R. Co. of Iowa, 44 Iowa, 134.
[13] Approved in McDonald v. Norfolk & W. R. Co., 95 Va. 98.
[14] Morse v. New York Cent., etc., R. Co., 39 Hun, 414.

Duty to furnish latest or best tools or appliances.

(1885) The court instructs the jury that a master is not absolutely bound to furnish his servant with safe machinery, and that the degree of care required of a master in selecting machinery for a servant's use is to be measured by the circumstances of each case, and depends on the kind of machinery used, the risks incident to its use, and the hazards of the business in which the machinery is used.[15]

(1886) The court instructs the jury that it is the duty of the master to exercise ordinary care, that is, such care as reasonable and prudent men use under like circumstances in providing safe and suitable appliances and instrumentalities for the work to be done, and in providing generally for the safety of the servant in the course of the employment, regard being had to the work and the difficulties and dangers attending the work.[16]

(1887) The court instructs the jury that if you believe from the evidence that the defendant employed plaintiff in and about its cars used to elevate ores, then it was defendant's duty to use reasonable diligence to supply said cars with reasonably safe appliances, and use reasonable diligence in adjusting such appliances, and use such diligence to keep them in reasonably safe condition.[17]

(1888) The court instructs the jury that this, however, does not imply that defendant was bound to use the highest skill, the greatest foresight, and the most extraordinary care in procuring the very best appliances; but rather those appliances which were reasonably best calculated to answer the end proposed.[18]

(1889) The court instructs the jury that a railroad com-

[15] Jones v. New York Cent., etc., R. Co., 22 Hun, 284.

[16] Bertha Zinc Co. v. Martin's Adm'r, 93 Va. 791.

[17] Approved in Quintana v. Consolidated Kansas City Smelting & Refining Co., 37 S. W. 369.

[18] Approved in Cooper v. Central R. Co. of Iowa, 44 Iowa, 134.

pany is not obliged to furnish the best known appliances for the purpose of protecting an employe from injuries which may result from negligence of a fellow servant, and if the jury believe from the evidence that the plaintiff was a brakeman in the employ of defendant railroad company and that plaintiff was injured as alleged in the declaration by the negligence of the switchman in leaving the switch open, and by the negligence of the engineer in failing to stop as required by a signal, and if the jury believe from the evidence that defendant used an ordinary switch which was in good order, then the jury are instructed to find for defendant.[19]

(1890) The court instructs the jury that the master is not bound in providing machinery, to provide against the possible neglect or inattention of the employes who operate the same and is not bound to provide the best and safest means known, but may use his own judgment provided the means furnished are reasonably safe, and that if the jury believe from the evidence that the plaintiff was injured as alleged in the declaration by the precipitation of the elevator of defendant to the ground, then, if the jury believe from the evidence, that only a short distance was left between the top of the elevator and the pulley block when run to the highest point intended to be reached, and that by failure to stop the engine when a certain mark placed on the belt for the information of the engineer was reached, the elevator fell, as described in the declaration and plaintiff was injured, and if the jury believe from the evidence that the defendant provided means for operating the elevator customarily used and which were reasonably safe, then the jury are instructed to find for defendant, though they may further believe from the evidence that the defendant did not provide the best and safest means known for operating the elevator.[20]

[19] Coppins v. New York Cent., etc., R. Co., 43 Hun, 26, 6 State Rep. 572.

[20] Stringham v. Stewart, 27 Hun, 562, 64 How. Pr. 5; Stringham v. Hilton, 111 N. Y. 188.

(1891) The court instructs the jury that a railroad company is not bound to furnish to its employes engines suitable and adequate in power to meet every emergency and that a railroad company may determine how powerful an engine may be at any place and for any purpose and if the jury believe from the evidence that the plaintiff was employed by the defendant railroad company as a yard master and that the plaintiff while in the pursuance of his duties as yard master, stepped between two cars on defendant's road for the purpose of coupling them and that the plaintiff's foot was caught and the engineer was unable to arrest the motion of the train, by reason of the insufficient power of his engine, then the jury are instructed that the mere fact that the defendant's engine was not sufficient to suddenly arrest the train in such emergency, will not render defendant liable for the injuries complained of in this suit.[21]

(1892) The court instructs the jury that plaintiff in this case alleges that he sustained injuries through an improper method of fastening the belt which operated the machinery around which plaintiff was employed by the defendant, and the court instructs the jury that if the fastening of the belt was the kind commonly used on ——— machinery, then defendant would be justified in using it for ——— and would not be liable for any damage caused by its use, unless defendant had information or reason to believe that its use was attended with danger, but if the fastenings on the belt were not the same as those in common use on such machinery, and if the jury believe from the evidence that the fastenings used by defendant were more dangerous than those in common use and that the difference in said fastenings in any manner contributed to cause the injury to plaintiff here sued for, then defendant will not be protected in using such fastenings.[22]

[21] Bajus v. Syracuse, B., etc., R. Co., 103 N. Y. 312, 3 State Rep. 96.
[22] Nix v. Texas Pac. R. Co., 82 Tex. 473.

(1893) The court instructs the jury that the law does not require defendant to provide an absolutely safe track and machinery for the use of its employes, and the fact that defendant's track may not have been in an absolutely safe condition does not authorize you to find for plaintiff. All that the law required of defendant was that its track should be in a reasonably safe condition, and if at the time of the wreck, you believe that defendant's roadbed, ties and rails were in a reasonably safe condition, you will find for the defendant on the issue of the defective tracks and ties.[23]

Delegation of duty.

(1894) The court instructs the jury that it is the duty of a railroad company not only to provide, but maintain, reasonably safe places for its servants to work in; and it cannot delegate this duty to another, and thereby relieve itself from responsibility. And a servant engaged in the service of a railroad company has a right to rely upon the company to furnish him with a reasonably safe place in which to work, and it is the duty of the company to maintain such place in a reasonably safe condition while the service continues.[24]

(1895) The court instructs the jury that the master is bound to use all reasonable care, diligence and caution in providing for the safety of those in his employ, and furnishing for their use in his work safe, sound and suitable tools, implements, appliances, and machinery in the prosecution thereof and in keeping the same in repair, and the master cannot delegate this duty to another, and if the jury believe from the evidence (that plaintiff was directed by defendant's foreman, under whose direction plaintiff was working, to go upon a platform described in the declaration, in the performance of a particular act alleged in the declaration and if the jury believe from the evidence that the act which plain-

[23] Approved in Gorham v. Kansas City & S. R. Co., 113 Mo. 408.

[24] Approved in Baltimore & O. S. W. Ry. Co. v. Spaulding, 21 Ind. App. 323.

tiff was directed to do was out of the ordinary line of his employment, and that the platform upon which plaintiff was directed to go, contained a defective plank, and if the jury believe from the evidence that the defect in the plank might have been discovered upon inspection before it was placed in position, and if the jury believe from the evidence that plaintiff used reasonable care and diligence to avoid the injury, then the jury are instructed that they shall find for the plaintiff).[25]

Defects in appliances and machinery in general.

(1896) The court instructs the jury that if they shall believe from the evidence, that on or about ——— the plaintiff was in the employ of defendant company as fireman, and that while in the discharge of his duty as such fireman, he was using ordinary care and prudence for his personal safety while he was so employed, and that he was injured by reason of the explosion of a certain boiler in the possession of and under the control of the defendant company, as alleged in the declaration; and if the jury shall further believe, from the evidence, that the explosion of said boiler was caused by negligence of the defendant company in allowing one of the wheels which controlled one of the valves of said boiler to be and remain broken off, so that the valve could not be operated properly with safety, and allowing the same to be and remain in an unsafe and defective condition to be used and operated with safety (if the same was so defective), and that the defendant company had actual knowledge of such defective condition (if the jury believe, from the evidence, it was so defective), or would, by the exercise of reasonable care and caution, have discovered such defective condition, then your verdict should be for the plaintiff.[26]

(1897) The court instructs the jury that the negligence alleged against the defendant by plaintiff is a failure to keep

[25] Benzing v. Steinway, 101 N. Y. 547.

[26] Approved in Calumet Iron & Steel Co. v. Martin, 115 Ill. 358.

in safe condition, or repair properly, machinery. If you should find, from the evidence and under the instructions of the court, that the accident shown in evidence occurred through the fact that the wheel operating the valve was broken, and that this was the direct cause of the accident, and that the defendant's agent or agents whose duty it was to repair this wheel were guilty of negligence in failing promptly so to do, and that plaintiff was injured without negligence on his part, and while exercising due care, then it is true that the defendant would be liable; but, on the contrary, should you find, from the evidence, that the accident did not occur from the fact that the wheel was broken, but that the valve, by due care, might be closed by other appliances, and that it was not so closed, either through lack of due care on the part of F. or owing to a "scale" or other mechanical obstruction in the valve, which causes would have the same effect had the wheel not been broken, then there can be no recovery here.[27]

Defects in tools or appliances furnished or manufactured by third persons.

(1898) The court instructs the jury that if they believe from the evidence that the scaffolding, the defect in which is alleged to have caused the injuries of plaintiff here sued for, was constructed by one who was not in the employ of the defendant, and if the jury believe from the evidence that the person so constructing the scaffolding was believed by the defendant to be competent to construct the scaffolding in a good and sufficient manner and that the defendant was not skilled in work of that kind, and if the jury believe from the evidence that the defect in the scaffolding could not have been ascertained by the exercise of reasonable care in making an examination of it, then the jury are instructed to find a verdict for the defendant.[28]

[27] Approved in Calumet Iron & Steel Co. v. Martin, 115 Ill. 358.

[28] Culligan v. Jones, 14 State Rep. 186, 28 Weekly Dig. 2.

Rolling stock, appliances, and tracks of railroad.

(1899) The court instructs the jury that if they believe from the evidence that the defendant employed the plaintiff, as a brakeman on one of its passenger trains, it became and was the duty of the defendant to provide the said plaintiff with reasonably safe cars and couplings for the performance of the work required of him as such brakeman, and that if the defendant failed to perform its duty in this regard, and did not provide the said plaintiff with reasonably safe and suitable cars and couplings and that, as a result of such failure of the defendant to perform said duty by providing said plaintiff with reasonably safe and suitable cars and couplings he was caught between two of defendant's cars, while he was trying to couple them together in the performance of his duty as said brakeman and injured as alleged, they should find for the plaintiff, unless they further believe that he was himself guilty of negligence which proximately contributed to his death.[29]

(1900) The court instructs the jury that the employes of a railroad corporation have a right to expect that the corporation will, so far as possible, provide for their protection in moving trains, sufficient machinery in good order and condition, and that it will exercise reasonable care and caution not to use cars in its trains having defective brakes; if, therefore, the jury believe from the testimony that the brake set by the brakeman T. was defective at the time of the accident, and that by the exercise of reasonable care and caution the defendant could have known said brake to be defective, then it is liable, and their verdict must be for the plaintiff; provided they believe from the testimony that the accident was caused by reason of said defective brake.[30]

(1901) The court instructs the jury that the only charge of negligence made in the petition against this defendant

[29] Approved in McDonald's Adm'r v. Norfolk & W. R. Co., 95 Va. 98.

[30] Approved in Mackey v. Baltimore & P. R. Co., 19 D. C. (8 Mackey) 282.

which you are to consider, is concerning the removal of the brake staffs from the flat cars which were loaded with steel, and it devolves upon the plaintiff to prove that the removal of said brake staffs was an act of negligence. The jury cannot presume that it was a negligent act from the fact, if it be a fact, that the cars escaped from the side track on to the main track, and there collided with B.'s train.[31]

(1902) The court instructs the jury that if they believe, from the evidence, that way car No. 3, mentioned in the testimony in this case, was the property of a company other than the defendant, and that such way car, at the time of the alleged injury to the plaintiff, and for several months next prior thereto had been, and was, regularly and daily running into and out of the defendant's yard at Q., by the permission of the defendant, and that at the time of said alleged injury, and for several months next prior thereto, the said way car was regularly and daily controlled and handled in the defendant's said yard by the defendant, with its own engine and employes, then it was the duty of the defendant to either use ordinary diligence to keep said car in a reasonably safe condition for handling, or else to require and see to it (if by the use of ordinary diligence the defendant could do so) that such car was kept by its owners in such reasonably safe condition.[32]

(1903) The court instructs the jury that if you believe from the evidence that the brake shoes on said car were in a defective and unsafe condition, as alleged in plaintiff's petition, and that by reason thereof, when the brake on said car was applied to stop same, if you find the brake was applied to stop same, it caused the car to stop so suddenly that plaintiff was thrown therefrom and run over and injured, as he

[31] Approved in Browning v. Wabash Western R. Co., 124 Mo. 55. See volume I, §§ 83-85, as to limiting consideration to the issues made by the pleadings.

[32] Approved in Chicago, B. & Q. R. Co. v. Avery, 109 Ill. 314.

alleges in his petition, and that the defendant knew, or by the exercise of ordinary care could have known of the defective and unsafe condition of said brake shoes, if you find that they were defective and unsafe, and that the plaintiff did not know of such unsafe and defective condition of said brake shoes, and could not have known of it by the exercise of ordinary care, and if he did know of it, could not, by ordinary care, have reasonably anticipated any danger therefrom, if any, and that defendant was negligent in having same on said car, and that the defective and unsafe condition of said brake shoes was the proximate cause of plaintiff's injuries, in this event also your verdict should be for plaintiff, unless you believe plaintiff was guilty of contributory negligence or assumed the risk as hereinafter defined.[33]

(1904) The court instructs the jury that it is the duty of the master to furnish proper, perfect and adequate machinery or other materials and appliances necessary for the work proposed to be done by the servant and that the master must show that such duty has been positively fulfilled and if the jury believe from the evidence that the plaintiff was in the employ of the defendant as a brakeman, and received his injuries while in the performance of his duties as a brakeman by reason of the rotten condition of the wooden stakes of a platform car belonging to the defendant as alleged in the declaration, and if the jury believe from the evidence that reasonable care would have discovered the defective condition of the wooden stakes, and if the jury further believe from the evidence that plaintiff was using due care and diligence, then the jury are instructed to find for the plaintiff, though they further believe from the evidence that the stakes were uniformly furnished by the shipper of the lumber with which the platform car was loaded.[34]

[33] Approved in Galveston, H. & S. A. R. Co. v. Parrish, 40 S. W. 191.

[34] Bushby v. New York, L. E., etc., R. Co., 37 Hun, 104.

(1905) The court instructs the jury that it is the duty of a railroad company to use reasonable care in providing suitable means, appliances and structures, with a view to the safety of its employes, and that they may not unnecessarily be exposed to danger of injury in the service of the company and the court instructs the jury that if they believe from the evidence that the plaintiff was in the employ of the defendant and received the injuries alleged in the declaration while in the performance of his duties by falling through a cattle guard described in the declaration, and if the jury believe from the evidence that the cattle guard was placed at a place where cars, after they had been weighed, were commonly and habitually coupled, and if the jury believe from the evidence that plaintiff was injured while in the performance of his duties in coupling cars at such place, then the jury may find from such facts that defendant was negligent.[35]

(1906) The court instructs the jury that it is the duty of a railroad company to furnish, maintain and keep in good repair, engines and other machinery and equipments reasonably suitable and safe for the transaction of their business, but the court instructs the jury that defendant is not liable in this case if it used a degree of care proportionate to the degree of hazard or danger which might reasonably be anticipated as consequent upon its neglect and if the defendant used such care and diligence in furnishing and keeping in good and safe repair the engine which plaintiff was trying to couple at the time of the alleged injury, then defendant was not liable for damages for the injuries plaintiff sued for.[36]

Same—Tracks and switches.

(1907) The court instructs the jury that it is the duty

[35] Fredenburg v. Northern Cent. R. Co., 114 N. Y. 582, 24 State Rep. 550.

[36] Houston & T. C. R. Co. v. O'Hare, 64 Tex. 600.

of a railroad company as regards its employes, to use all ordinary care and supervision to keep its road way for the operation of its trains by its employes, in a good and safe condition so that the employes may not be exposed to unnecessary hazards in the operation of its trains. The deceased had a right to assume that the defendant would use all reasonable care in the keeping of its road in a good and safe condition for the operation of its trains by its employes.[37]

(1908) The court instructs the jury that, if they believe from the evidence that the main and side tracks of the defendant's road at ——— were, on ———, 19—, on a grade that descended eastward and that defendant's division road master at or about said first-named day, negligently caused the brake staffs to be taken off of nine or more flat cars and the same to be loaded with iron or steel rails and then set in upon said ——— side track without any brakes set, or that could be set or other reasonable or safe means or appliances for securing them in their places, or for stopping them if put in motion, so that said cars could not be safely coupled up or handled, and were liable to move or be easily put in motion and to escape onto defendant's other side or main track and obstruct the same, and that in direct consequence of said negligent acts of defendant's servants and agents (if they find them negligent) said cars did escape from said side track on to defendant's main line and collided with train number 27, whereby plaintiff's husband, without any negligence on his part contributing thereto, was killed, then the jury will find for plaintiff.[38]

Same—Hand-cars.

(1909) The court instructs the jury that it is alleged that the velocipede hand-car which was given the deceased, M., by defendant to use was a new, unsafe machine, and had latent defects which were known or might have been known with

[37] McKee v. Cedar Rapids, I. & P. Ry. Co., 83 Iowa, 616.

[38] Approved in Browning v. Wabash Western R. Co., 124 Mo. 55.

reasonable diligence by defendant, but which were not known, and could not, by the use of ordinary care, have been ascertained by deceased; and by reason of the said defective velocipede hand-car, the said deceased was thrown from said car and lost his life by a passing train of defendant running over him. You will look to all the evidence and ascertain, first, if the deceased lost his life by reason of defects in the velocipede hand-car. You will then inquire what such defects were, and if the defects, if any existed, were latent, such as were known or might have been known by defendant by the use of ordinary diligence, and if the same were unknown by deceased, and could not be known by him with ordinary care; and if said machine was given to deceased to use by the master without explanation, and he was required to use the same on defendant's road, the defendant would be liable to the plaintiff for such actual damages as she has sustained, under the instructions herein given.[39]

Platforms, scaffolds, and supports.

(1910) The court instructs the jury that while the master is not bound to use the best possible materials in the construction of a scaffold on which an employe is at work, he is liable for injuries resulting from his failure to furnish material of suitable strength and to provide a scaffold constructed in a proper manner, and if the jury believe from the evidence (that the defendant erected an elevated scaffold, as alleged in the declaration, upon which plaintiff was required to work in delivering coal, and if the jury believe from the evidence, that in view of the business to be carried on by defendant in delivering coal from cars into wagons, it was to be expected that teams and wagons would, without negligence or wrong on the part of persons in care of them, come in contact with the supports of the platform and loosen the same, then if the jury believe from the evidence that the defend-

[39] International & G. N. Ry. Co. v. McCarthy, 64 Tex. 632.

ant failed to guard the supports of the platform, so as to prevent the contact of teams and wagons with the supports, and that plaintiff received the injuries here sued for by reason of a wagon being driven against the support of the platform and causing it to fall, then the jury are instructed that from such facts they may find that defendant was negligent, and may render a verdict for plaintiff).[40]

(1911) The court instructs the jury that it was the duty of the defendant to exercise ordinary and reasonable care to provide a reasonably safe place for the plaintiff to do the work which he was engaged to perform, and if you find that plaintiff was employed by the defendant and directed to go on top of the elevator in question and do the work he was engaged in at the time of the injury, then it was the duty of the defendant to have exercised ordinary and reasonable care proportionate to the danger, in providing for him a reasonably safe staging or platform on which to do the work; and if you find that defendant failed in this, by omitting to have the boards or planks composing the staging or runway nailed or otherwise properly secured and that in consequence thereof plaintiff, without fault on his part, and in the exercise of ordinary care was injured, then he is entitled to recover in this action, and you will so find.[41]

(1912) The court instructs the jury that it was the duty of the defendant to use reasonable care to furnish for the use of plaintiff and his fellow workmen a scaffolding that was reasonably safe for the purpose for which it was intended and used; and if you find that the defendant negligently failed to perform this duty and furnished a scaffolding that was unsafe, that defendant's foreman in charge of the men and the work knew of the unsafe condition of said scaffolding and that with such knowledge upon the part of the said foreman, the said foreman further negligently failed to either

[40] Selleck v. Langdon & Co., 55 Hun, 19, 28 State Rep. 326.

[41] Approved in Doyle v. Missouri, K. & T. Trust Co., 41 S. W. 255.

remedy the defect or warn the plaintiff of the danger of going upon said scaffolding, and that the plaintiff, while in the exercise of ordinary care, and without negligence upon his part and without knowledge of the unsafe condition of the scaffolding, went upon said scaffolding in the performance of the duty assigned him, and by reason of the defect therein was thrown to the ground and injured, then plaintiff is entitled to recover.[42]

(1913) The court instructs the jury that if you find that the staging or runway on which plaintiff was injured was constructed before he was sent up there to work, then it is immaterial as to who or which one of defendant's employes constructed it, as it would then be the duty of the defendant in such case to have exercised reasonable care to have prepared there a staging or runway that was reasonably safe for plaintiff to work upon.[43]

Care required in regard to places provided for escape in case of fire.

(1914) The court instructs the jury that if they believe from the evidence that plaintiff was employed in defendant's factory and that the plaintiff received the injuries as alleged in the declaration while attempting to escape from the factory while fire was in progress, and that if the jury believe from the evidence that the only means of escape available to the plaintiff was by a ladder which did not reach to the ground and if the jury believe from the evidence that beneath the ladder was a mass of scrap iron and sharp pointed rocks and that plaintiff in attempting to escape down the ladder fell upon the iron and rocks and received the injuries sued for, then the jury are instructed to find for the plaintiff, if they further believe from the evidence that plaintiff was not guilty of negligence contributing to the injury sued for.[44]

[42] Approved in Doyle v. Missouri, K. & T. Trust Co., 41 S. W. 255.
[43] Approved in Doyle v. Missouri, K. & T. Trust Co., 41 S. W. 255.
[44] Johnson v. Steam Gauge & Lantern Co., 72 Hun, 535, 55 State Rep. 133, 25 N. Y. Supp. 689.

Care as to elevators.

(1915) The court instructs the jury that an employer discharges his duty to his servant when he furnishes a machine reasonably safe and suitable, such as is ordinarily used in the business, and which is in good repair, and if the jury believe from the evidence that plaintiff was injured as alleged in the declaration by the falling of the elevator in defendant's building, and that the elevator was provided with the usual and approved contrivances for preventing the elevator from being carried too high or from falling, and if the jury believe from the evidence that defendant exercised reasonable care and diligence in inspecting the elevator and that no defects were apparent in the elevator or its equipment, then the jury are instructed to find for the defendant.[45]

Inspection by master and knowledge of defects.

(1916) The court instructs the jury that if they believe from the evidence that the injury to the plaintiff was caused by a defect in the chain on the brake of the defendant's cars, without any fault on the part of the plaintiff, and shall further believe that said defect was known to the defendant, or might have been known to it by a careful inspection of said chain and brake, then the jury should find for the plaintiff.[46]

(1917) The court instructs the jury that if they believe from the evidence that plaintiff was in the employ of the defendant railroad company as an engineer and that the roadbed over which the plaintiff operated the engine, of which he was in charge, had been undermined by floods, and the roadbed had remained in this condition for some weeks, and if the jury believe from the evidence that the defendant performed the inspection of the condition of the roadbed in a careless and negligent manner so that the condition of the roadbed was not discovered, and if the jury believe from the evidence that the engine which plaintiff operated was thrown

[45] Kaye v. Rob Roy Hosiery Co., 51 Hun, 519, 21 State Rep. 668.
[46] Richmond & D. R. Co. v. Burnett, 88 Va. 538.

off the track by reason of the giving in of the roadbed through its undermined condition and that plaintiff thereby received the injuries sued for, then the jury are instructed that they may find for plaintiff.[47]

(1918) The court instructs the jury that the mere fact that there may have been decayed ties in the roadbed at the point of the accident does not authorize you to find for plaintiff. You must further believe that the decayed condition of the ties, if they were decayed, was the cause of the wreck and that defendant knew, or by the exercise of ordinary care, might have known of the decayed condition of the ties, and that the wreck was caused by the fact that the ties were decayed, and unless you so believe, you will find for the defendant on this issue. You are not authorized to find for the plaintiff from the fact alone that the ties were rotten at the point where the wreck occurred.[48]

(1919) The court instructs the jury that if the defendant used a drawbar defective, by reason of its being too short or out of repair, knowing it to be out of repair, or might have known of its want of repair by the use of ordinary care as before stated, by reason of which defective condition it was not reasonably safe to its brakeman, and the plaintiff, not knowing of such defective condition, attempted to couple the way car to the engine and in so doing exercised the ordinary care of a reasonably prudent man, under all the circumstances then surrounding him, and in doing so was caught between the engine and cars and injured, you will find for plaintiff.[49]

(1920) The court instructs the jury that if a servant, knowing the hazards of his employment, as the business is conducted, is injured while engaged therein, he cannot maintain an action against his employer for the injury merely because the business might have been carried on in a safer

[47] Durkin v. Sharp, 88 N. Y. 225.

[48] Approved in Gorham v. Kansas City & S. R. Co., 113 Mo. 408.

[49] Belair v. Chicago & N. W. R. Co., 43 Iowa, 662.

manner, but if there are increased perils in the business, because of the use of defective appliances in the business and such defects are known to the master and are unknown to the servant, and the servant is free from negligence, then the master is liable for injuries caused by such defective appliances.[50]

Duty of master to keep machinery, tools, and appliances in repair.

(1921) The court instructs the jury that it is not necessary in order to hold a master liable for an omission in keeping machinery and implements in proper repair, to see in advance, all the possibilities which may result from an omission of the duty; but if the accident is of such a nature that its occurrence might reasonably be apprehended from the failure to take the precaution in question, and if it did thus happen then the master may be held liable for the omission.[51]

(1922) The court instructs the jury that it is not the master's duty to repair defects arising in the daily use of the appliance, for which proper and suitable materials are supplied, and which may easily be remedied by the workmen, and are not of a permanent character and do not require the help of skilled mechanics, and if the jury believe from the evidence, that plaintiff was employed by the defendant in hoisting coal, as alleged in the declaration, and that the plaintiff received the injuries here sued for, through the breaking of a rope used to raise coal from the hold of a vessel, and if the jury believe from the evidence that the breaking of the rope was due to the greatly weakened condition of the rope through daily use and that the weakening of the rope would have been apparent to plaintiff upon inspection and if the jury believe from the evidence that a new one could have been

[50] Behm v. Armour, 58 Wis. 2.

[51] Lilly v. New York Cent., etc., R. Co., 107 N. Y. 566, 12 State Rep. 468.

procured upon request of the plaintiff, then the instructed to find for the defendant.[52]

Latent defects.

(1923) The court instructs the jury that an employer is not liable for injuries caused by latent defects in machinery and appliances, and if the jury believe from the evidence (that the plaintiff was employed by defendant as machinist and while in the performance of his duties, plaintiff removed a cap from a force pump, as alleged in the declaration, which had become clogged with whitewash thrown through it and that the contents of the force pump were blown into the eyes of the plaintiff by the compressed air thus freed, thus causing the injuries here sued for, and if the jury believe from the evidence that no defects in the apparatus were visible, and no danger of explosion was to be expected in its use, and that the defendant was exercising reasonable care and diligence in inspecting the machinery, and apparatus, then the jury are instructed to find for the defendant).[53]

(1924) The court instructs the jury that if they believe from the evidence that the plaintiff was in the employ of defendant as alleged in this declaration and received the injuries here sued for while in the performance of his duties in the construction of a bridge, through the falling of an iron girder and that the fall was occasioned by the breaking of a hook with which the girder was hoisted, and if the jury believe from the evidence that the hook was one of a number made by a blacksmith in defendant's employ, from the best grade of iron procurable and that the hooks so made had been used in the same work without showing weakness and that the hook in question, the breaking of which caused the injury in suit, had been in use for three months, and if the jury believe from the evidence that the break was clean and resulted

[52] Cregan v. Marston, 126 N. Y. 568, 38 State Rep. 428.

[53] Kelley v. Forty-Second Street, M., etc., R. Co., 58 Hun, 93, 33 State Rep. 816.

from the crystallization of the iron, which could not be discovered by an external examination, nor in the process of making the hook, then the jury are instructed to find for defendant.[54]

(1925) The court instructs the jury that the master is only bound to exercise reasonable care and diligence in the selection and maintenance of machinery used in the business and the degree of care depends on the kind of machinery furnished and the hazard attendant upon the kind of business. The master is not required to apply tests to the safety of the machinery which can only be applied by taking it to pieces or effecting its practical destruction, and if the jury believe from the evidence (that the plaintiff received the injuries sued for while in the performance of his duties as servant of defendant, by the explosion of a boiler in defendant's factory as alleged in the declaration, and if the jury believe from the evidence that the explosion was caused by defects in the quality of the iron out of which the boiler was constructed, but that the defect could only be discovered by cutting or breaking the boiler, or by taking the boiler apart, and if the jury believe from the evidence that the boiler was purchased from reputable and reliable manufacturers and had been submitted to all the ordinary tests, then the jury are instructed to find for defendant).[55]

Improper use of tools, appliances, or places furnished by master.

(1926) The court instructs the jury that an employer is not liable for injuries resulting from the improper use of safe appliances furnished to the servants, and if the jury believe from the evidence (that plaintiff was in the employ of the defendant as alleged in the declaration and that while in the performance of his duties in the manipulation of the

[54] Carlson v. Phoenix Bridge Co., 132 N. Y. 273.

[55] Ballard v. Hitchcock Mfg. Co., 51 Hun, 188, 21 State Rep. 548.

derrick described in the declaration, plaintiff received the injuries here complained of, because of the manner of the use of the cable for the derrick by the servants engaged to set it up and if the jury believe from the evidence that defendant furnished a proper cable for the derrick and proper equipment, then the jury are instructed to find for defendant).[56]

Tools, appliances, or places selected by servant.

(1927) The court instructs the jury that the duty of the master to furnish a safe place in which work shall be done does not extend to an appliance or instrumentality erected by the employes themselves, and through the aid of which they did their work, and if the jury believe from the evidence (that the plaintiff was employed by the defendant in erecting the building described in the declaration and that the plaintiff, while in the performance of his duties, received the injuries sued for by the falling of the staging on which plaintiff was standing for the purpose of performing his duties, and if the jury believe from the evidence that the staging on which plaintiff was standing had been constructed for plaintiff and that the material used in the staging was apparently sound and that some defect in the construction of the staging caused it to fall, then the jury are instructed to find for the defendant).[57]

IV. Methods of Work, Rules, and Orders.

Methods of work.

(1928) The court instructs the jury for the plaintiff, that the defendant (could not lawfully hoist any coal out of its mine while persons are ascending out of or descending into its said mine, and if the jury believe from the evidence that plaintiff was an employe of defendant in said mine described in the declaration, and that the defendant willfully undertook to hoist the plaintiff out of its mine while it was hoisting

[56] Yaw v. Whitmore, 37 App. Div. 98.
[57] Butler v. Townsend, 126 N. Y. 105.

coal out of said mine and that thereby plaintiff received the injuries sued for in this case, and if the jury believe from the evidence that the plaintiff was in the exercise of due care, the jury will find the defendant guilty).[58]

(1929) The court instructs the jury that if they believe from the evidence that at the time of the injury to the plaintiff there was trouble with the couplings which the said plaintiff was attempting to make, and that the conductor knew the fact, and that said conductor ordered him to make the coupling with his hand and was told by the plaintiff that he would do so, but that he, the said conductor, must have the train come back "very light"; that the conductor, instead of signaling the engineer to come back gently, gave the signal to come in the usual way when couplings are to be made, and that the said injury occurred in consequence of his, the said conductor's, giving the signal as he did, and not in giving the signal to come back gently, they must find a verdict for the plaintiff.[59]

(1930) The court instructs the jury that if they believe from the evidence that it is dangerous to thaw frozen dynamite by an open fire, and that the method of thawing dynamite by an open fire is not reasonably safe, and that such dangers could be avoided or greatly reduced by the use of appliances and methods, which were within easy reach of the master, and that the existence of such danger and the means of avoiding it or greatly reducing it, were known to the master, or by the exercise of reasonable care and diligence on his part could have been known to him, that it was a duty that the master owed his servants to adopt such methods and use such appliances as were reasonably safe, and any other methods which were not reasonably safe will not excuse the master for injuries to the servant resulting therefrom.[60]

[58] Litchfield Coal Co. v. Taylor, 81 Ill. 590.

[59] Approved in Norfolk & W. R. Co. v. Ampey, 93 Va. 108.

[60] Approved in Bertha Zinc Co. v. Martin's Adm'r, 93 Va. 791.

(1931) The court instructs the jury that if you believe from the evidence that it was dangerous to ship and handle dynamite with the car doors open and that such danger could be avoided and greatly reduced by shipping in some safer way, which was in easy reach of the master, and that the existence of such danger and the means of avoiding or reducing it were known to or could have been known by the master by the exercise of reasonable care and diligence, it was a duty the master owed his servants to adopt such method of shipping such dynamite as was reasonably safe and any other method which was not reasonably safe will not excuse the master for injuries to the servant resulting therefrom.[64]

Duty to promulgate rules.

(1932) The court instructs the jury that it was the duty of the defendant to use ordinary care and prudence in making and publishing to its employes sufficient and necessary rules for the safe running of its trains and for government of its employes and as great a degree of care for their safety, taking into consideration their hazardous employment, as could be procured by ordinary care and prudence, and the more hazardous the employment the greater is the degree of care required by the law.[61]

V. Warning and Instructing Servant.

Duty to acquaint servant with dangers of employment.

(1933) The court instructs the jury that if defendant knew or if he had good reason to believe that rigid or forcible resistance would be offered to him and his party by parties whom he knew or believed to be there, on that ground or in the vicinity, it was his duty to inform plaintiff of the nature of the employment, to disclose to him that knowledge, so that plaintiff might act understandingly, and take the chances, if he chose to do so. If defendant had such knowledge and concealed it from plaintiff, then he is liable.[62]

[61] Approved in Cooper v. Central R. Co. of Iowa, 44 Iowa, 134.

[62] Approved in Baxter v. Roberts, 44 Cal. 187.

Methods of handling explosives.

(1934) The court instructs the jury that before using a highly dangerous explosive it is the duty of the master to ascertain and make known to his servants the dangers to be reasonably apprehended from its use and the proper method of manipulating it with reasonable safety, and the ignorance of the master as to the dangers to be apprehended from its use, or the proper methods of manipulating it, will furnish no excuse when the master, by the exercise of reasonable diligence, could have obtained such knowledge.[63]

Instructions to be given to young and inexperienced employes.

(1935) The court instructs the jury that plaintiff in this case avers that he was about ——— years of age and that he had been employed for only a short time in the factory of defendant and the court instructs you that if you believe from the evidence that the plaintiff by reason of youth and inexperience did not know and understand the hazards of the work in which he was engaged and that defendant or those of the employes of defendant who put plaintiff to work in the defendant's factory knew or ought to have known, and those employes of defendant to whose orders or directions plaintiff was subject in discharging his duties to defendant, knowingly put the plaintiff to work in a place of unusual danger, then it was their duty to give plaintiff reasonable warning of such danger and suitable instructions to enable him to understand his situation and to protect himself.[65]

VI. Fellow Servants.

In general.

(1936) The court instructs the jury that if they believe, from the evidence, that the alleged injury to the plaintiff

[63] Approved in Bertha Zinc Co. v. Martin's Adm'r, 93 Va. 791.

[64] Approved in Rush v. Spokane Falls & N. Ry. Co., 20 Am. & Eng. Ry. Cas., N. S., 285.

[65] International & G. N. R. Co. v. Hinzie, Guardian, 82 Tex. 623.

was occasioned by negligence of any of the officers or employes of the defendant not in the same line of duty with the plaintiff, then such negligence would be, in contemplation of law, negligence of the defendant.[66]

Number and efficiency.

(1937) The court instructs the jury that the plaintiff cannot recover unless the defendant was negligent at the time and place of the accident, and such negligence must have been the proximate and direct cause of the accident. The number of hands employed on the train between S. and P., and when taking up cars at P., cannot be considered by the jury, in reaching their verdict, unless they believe from the evidence that the injury complained of was caused by the defendant not having at or near the place of coupling a sufficient number of efficient men to give the necessary signals to the engineer and make the coupling in question.[67]

(1938) The court instructs the jury that it is the duty of a railroad company to use great care in furnishing to its employes safe machinery to be used in the prosecution of its business, and that persons to whom this duty is confided by the company must be regarded as its representatives for this purpose, for whose negligence in this respect, if any injury results therefrom, the company will be liable to an employe who is free from contributory negligence.[68]

(1939) The court instructs the jury that a railroad company is required to use care and caution in selecting skillful and competent engineers and other employes to perform the services requires. And for any injury resulting to an employe from a failure to use such care and caution, such railroad company is liable, unless the injury results from negligence

[66] Approved in Chicago, B. & Q. R. Co. v. Avery, 109 Ill. 314.
[67] Approved in McDonald v. Norfolk & W. R. Co., 95 Va. 98.
[68] Houston & T. C. R. Co. v. O'Hare, 64 Tex. 600.

or want of care on the part of such employe or that of a fellow servant.[69]

Difference in character of work as determining relation.

(1940) The court instructs the jury that the mere fact that of a gang of workmen one is the foreman, does not prevent their all being servants in the same line of employment, or render the employer liable for an injury resulting from the negligence of such superintendent or superior.[70]

(1941) The court instructs the jury that the common employer is not liable for any injury that may accrue to one of a set of fellow servants of that common employer engaged in the same line of employment, by reason of the negligence of a fellow servant in the same line of employment, and the fact that the fellow servants are employed by different agents of the common employer, or that one has general supervision of the work of the whole, and a right to direct its execution, does not prevent them from being fellow servants of the common employer in the same line of employment.[71]

(1942) The court instructs the jury that if you believe from the evidence that, at the time of the accident, W. and R. were employed by the defendant at the same wages and in the same general service, and that it was a part of the duty of said W. to weigh limestone, and to inform the said R. and his other colaborers when cars were needed at the platform for loading, and to aid said laborers in pushing empty cars to their loading places, still such authority given to said W. to weigh limestone and to indicate the time and place of pushing cars did not make him anything more than a fellow servant with said R., and did not render the defendant liable for any injury resulting from the failure of said W. properly to direct and superintend the moving of the cars or the failure

[69] Approved in East Line & Red River R. Co. v. Scott, 71 Tex. 703.
[70] Approved in Chicago & A. R. Co. v. May, 108 Ill. 288.
[71] Approved in Chicago & A. R. Co. v. May, 108 Ill. 288.

of any of the other colaborers of said R. properly to move the cars that caused the death of said R.[72]

(1943) The court instructs the jury that if plaintiff was, at the time of the explosion, engaged in the management of an engine of defendant on its railroad, then the engineer on the pile driver and plaintiff would be fellow servants, and for an injury resulting to plaintiff from carelessness or negligence of such engineer, plaintiff cannot recover.[73]

(1944) The court instructs the jury that, if the plaintiff, being a night watchman of defendant, was at the time of the explosion at the place of explosion, and was sent there in charge of the engine which pulled the car on which was the boiler that afterwards exploded, by direction of one ——— the regular engineer in charge of said engine, and you further find that under the custom and usage of defendant's road management, plaintiff was expected or required to obey said directions, and did obey said ———'s directions, then if plaintiff was injured by said explosion while at a proper place in carrying out said directions, by the acts of negligence of defendant as charged, defendant would be liable.[74]

Same—Engineer and brakeman.

(1945) The court instructs the jury that if they believe from the evidence that ——— was the engineer, and ——— plaintiff, a brakeman on the same train, working under the same conductor, deriving their authority and compensation from the same source, and were engaged in the same general business of running the train on which they were working, and one not in authority over the other, they were fellow servants, and each took the risk of the other's negligence.[75]

Vice principals and persons engaged in superintendence.

(1946) The jury are instructed that if the defendant rail-

[72] Approved in Moore Lime Co. v. Richardson's Adm'r, 95 Va. 326.
[73] Approved in East Line & Red River R. Co. v. Scott, 71 Tex. 703.
[74] Approved in East Line & Red River R. Co. v. Scott, 71 Tex. 703.
[75] Approved in McDonald v. Norfolk & W. R. Co., 95 Va. 98.

way company had a gang of men, among whom was plaintiff, digging down the embankment as disclosed by the evidence, and if said men were under the control and management and subject to the directions of a superintendent or foreman of such defendant railway company, then such superintendent or foreman was the vice principal and his acts in directing and controlling said men were the acts of the defendant.[76]

(1947) The court instructs the jury that if from a preponderance of the evidence, you believe that G. was intrusted by the defendant with the power to manage, control and direct plaintiff and the other men in the bridge gang in the performance of their work; and that, by virtue of such power, the said G. ordered the said plaintiff and three other men to carry an iron guard rail from the bridge in the manner alleged in plaintiff's petition; and that in attempting to carry the guard rail as directed, said plaintiff was thrown from the bridge and injured in the manner alleged in plaintiff's petition; and the manner in which G. directed the rail to be moved, if he gave any direction, was an improper and unusual method of moving the rail, and that it was attended with unusual danger and hazard, and that it was negligence to so order its removal, and that such negligence, if any, directly caused the injury of plaintiff, then your verdict should be for plaintiff unless you further find that plaintiff was guilty of contributory negligence or assumed the risk as hereinafter charged.[77]

(1948) The court instructs the jury that the fact that the said H. was superior in power and authority over the said plaintiff in the service of said company at the time of said accident, would not of itself destroy the relation of coservant as between the said H. and said plaintiff, and if they believe from the evidence that the said H. was capable of running the said machine and was working within the scope of his em-

[76] Approved in Bradley v. Chicago, M. & St. P. R. Co., 39 S. W. 763.

[77] Approved in Galveston, H. & S. A. R. Co. v. Bonnett, 38 S. W. 813.

ployment at the time of the accident and that the said plaintiff then and there knew how to perform his duties as a helper upon the said machine, they would in that case be coservants, although the jury might believe the accident resulted from the negligence of said H. Under such circumstances, the plaintiff would not be entitled to recover in this action, and the jury should so find.[78]

Same—Conductor and brakeman.

(1949) The court instructs the jury that if they believe from the evidence that the conductor was responsible for the safety, prompt movement, and proper care of his train, for the conduct of the men employed thereon, and for signals, lamps, and tools entrusted to his care, that it was his duty to see that the couplings and brakes on his train were in good order before starting, and inspect them when the train stopped for water or for other trains; and that the plaintiff ——— was at the time of his injury under the directions of the said conductor, then the said conductor was not a fellow servant with the said plaintiff, but, on the contrary, stood in the place of the railroad company itself. And the court instructs the jury that if they shall further believe from the evidence that the injury to the plaintiff was caused by the negligence of the said conductor, as charged in the declaration, then the negligence of the said conductor was the negligence of the ——— Railroad Company, and the jury must find for the plaintiff, unless the plaintiff was also guilty of negligence which contributed to his injury.[79]

Same—Section foreman and laborer.

(1950) The court instructs the jury that a section master of a railroad company, in charge of a particular section of the company's road, with a force of hands under him, to take care of and preserve said section, is not merely a coemploye

[78] McVey v. St. Clair Co., 49 W. Va. 412.
[79] Norfolk & W. R. Co. v. Ampey, 93 Va. 108.

with said hands, on an equal footing with them, but that the relation between the section master and those working under him is that which exists between a superior and a subordinate, and that in all matters pertaining to the particular department to which the section master is engaged, he is the representative of the company, and, therefore, if one who is employed by the section master to work under him on his section is injured by the negligence of the section master, whilst engaged in and about said employment, the company cannot escape liability for said injury upon the ground that the injured party was the coemploye of the section master; but the jury are further instructed that this will not prevent the company from showing, if it can, that, on other grounds or for other reasons, it is not liable to the injured party for the injuries he has sustained.[80]

VII. Risks Assumed by Servant.

Nature and extent in general.

(1951) The court instructs the jury that if the alleged defect or danger to which the plaintiff was exposed was a risk assumed by him, or if such defect or danger was a risk ordinarily incident to the service of plaintiff, or one of which he knew or by the exercise of ordinary care in the discharge of his duties might have known, plaintiff cannot recover.[81]

(1952) The court instructs the jury that the servant assumes the ordinary risks incident to the service after the master has used proper care, diligence and caution for the safety and protection of the servant, commensurate with the danger to be reasonably apprehended from the service; and if the master fails to use such care and caution, and an injury results therefrom, it is not a risk incident to the employment, and the master is liable therefor, unless the danger was open and apparent, or the servant had actual knowledge thereof.[82]

[80] Approved in Tyler v. Chesapeake & O. R. Co., 88 Va. 389.
[81] Texas & N. O. R. Co. v. Echols (Tex. Civ. App.) 41 S. W. 488.
[82] Bertha Zinc Co. v. Martin's Adm'r, 93 Va. 791.

(1953) The court instructs the jury that while a servant, in accepting employment, assumes the ordinary risks incident to it, he does not assume those occasioned by the negligence of the master; and while plaintiff in the present case assumed the ordinary risks incident to the work he was called upon to perform, he did not assume those, if there were any such, arising from negligence of the defendant.[83]

(1954) The court instructs the jury that a servant entering into a dangerous employment assumes such risks as are ordinarily incident to the employment from causes open and obvious to the servant, the dangerous character of which he had opportunity to ascertain, and he must exercise reasonable care and caution for his own safety while engaged in the master's service; and it is the duty of the master to exercise ordinary care, such care as an ordinarily prudent man would use under like circumstances in providing safe and suitable appliances and instrumentalities for the work to be done by the servant, and in providing generally for his safety in the course of the employment, regard being had to the work and the difficulties and dangers attending it.[84]

(1955) The court instructs the jury that a servant entering upon a dangerous employment assumes all the ordinary and natural risks usually incident to such employment; but he does not assume extraordinary risks arising from the use of defective machinery, unless the servant has knowledge of the use of such defective machinery, and then after such knowledge chooses to continue in the master's employment.[85]

(1956) The court instructs the jury that the plaintiff is entitled to a verdict if the jury believe that the death of her husband was due to the absence of steam in defendant's still, and that steam as a preventive of explosion was at the time in common and ordinary use and was required to render the

[83] Approved in Doyle v. Missouri, K. & T. Trust Co., 41 S. W. 255.

[84] Bertha Zinc Co. v. Martin, 93 Va. 791.

[85] Richlands Iron Co. v. Elkins, 90 Va. 249.

still reasonably safe, according to the usages, habits and ordinary risks of the business, and that this was, or ought to have been, known to the defendant, and that the decedent by reason of inexperience and want of instructions from defendant or his agents was ignorant of the increased risks occasioned by the absence of steam, and that the risk was not apparent to him, and he had no opportunity to ascertain it.[86]

Compensation as consideration for risks and dangers.

(1957) The court instructs the jury that the law presumes the compensation paid a person employed as a brakeman on a railroad is in part, a consideration for the risks, hazards and dangers ordinarily incident to that service.[87]

(1958) The court instructs the jury that when the plaintiff entered the service of the defendant company the law presumes that he contracted with reference to the risks and hazards incident to the business of his employment as the company conducted it at the time he entered it, and that his compensation was adjusted accordingly.[88]

Right of servant to rely on care of master.

(1959) The court instructs the jury that in the absence of notice to the contrary, a servant has a right to assume both that the master has furnished proper, adequate, and perfect implements and appliances for the performance of any work that may be required at his hands, and that the master knows the proper kind, quality and fashion of machinery to be used.[89]

(1960) The court instructs the jury that plaintiff had a right to assume and rely and act upon the assumption that the defendant had used reasonable care in furnishing a reasonably safe scaffolding, staging or platform, upon which he

[86] Approved in Bannon v. Lutz, 158 Pa. 166.
[87] Approved in Way v. Illinois Cent. R. Co., 40 Iowa, 341.
[88] Approved in Norfolk & W. R. Co. v. Ampey, 93 Va. 108.
[89] Kain v. Smith, 89 N. Y. 375

was required to pass in the duties of his employment, if he was so required to pass; and that plaintiff was not required to search or inspect such staging, scaffolding or platform for defects therein that were not obvious and apparent.[90]

(1961) The court instructs the jury that if they believe that the plaintiff was in the employ of defendant railway company as brakeman and was injured as alleged in the declaration, while in the performance of his duty in switching cars belonging to the defendant, then the jury are instructed that the delivery of such car to the plaintiff for use raises for his benefit the implication that the defendant has used suitable care and foresight in adopting it as an instrument or means to carry on its business and that plaintiff could not only rely upon the body of the car and its running gear being safe, but he could also presume that the needed equipment for the reception of the load placed upon the car has been provided.[91]

(1962) The court instructs the jury that a railroad company is required to use ordinary care in constructing and maintaining its roadway, switches, and appliances in such a manner and condition that its servant can do and perform all the labor and duties required of him with reasonable safety, and a servant has a right to presume that the company has in these respects done its duty, and a servant does not assume risks flowing from his employer's negligence in these duties, nor is there imposed upon him any duty of watchfulness and care to discover defects in the roadway or switches, when he has no notice of danger and when not so glaring and apparent as to be open to the observation of ordinarily prudent men, and when not specially directed thereto by his employer, and he will not be presumed to know of danger therein when of such character that they might well escape the observation of a prudent person.[92]

[90] Approved in Doyle v. Missouri, K. & T. Trust Co., 41 S. W. 255.
[91] Bushby v. New York, L. E., etc., R. Co., 107 N. Y. 374.
[92] Approved in Pennsylvania Co. v. McConnack, 131 Ind. 250.

Dangers known to servant and obvious and latent defects.

(1963) The court instructs the jury that of the dangers and risks included in, and incident to, the employment, and of which the servant accepts the risks, are those which are made known to the servant and which he should have known by observation in the course of his employment. If therefore plaintiff knew of the danger of the bridge at which he received the alleged injuries, or ought to have known of it before the accident, and continued in the employment of defendant, he assumed the risk of the injury, and cannot recover, unless the jury further believe from the evidence, that owing to the circumstances existing at the time of the accident he could not by ordinary care and foresight discover the locality, and his approach to the dangerous locality.[93]

(1964) The court instructs the jury that an employe or servant has the right to assume in the absence of knowledge to the contrary, that the appliances which he is called upon to use in the performance of his work, are reasonably safe, and if there are latent defects of which he has no knowledge, or which are not obvious to him while using ordinary care and observation, then he does not assume the risk attendant thereon.[94]

(1965) The court instructs the jury that when one accepts employment from another, he assumes such risks as may exist from latent defects in machinery or appliances with which he is engaged in the discharge of his employment. Latent defects are such as may exist in machinery and appliances, but which are not discovered by the exercise of that degree of diligence which a man of ordinary care and diligence would have exercised under like circumstances, but he does not assume such risks as may arise from the negligence of the person employing him, for instance, such as may arise

[93] Edmunds & Blackford, Trustees, v. Hobbie Piano Co., 97 Va. 588.

[94] Approved in Doyle v. Missouri, K. & T. Trust Co., 41 S. W. 255.

from defects in machinery which his employer provides, if such defect exist because of the negligence of his employer.[95]

(1966) The court instructs the jury that the plaintiff, by entering the employment of the defendant, and engaging in the work upon the top of the elevator, assumed the ordinary risks and dangers incident thereto, not only so far as they were known to him, but also so far as they could have been known to him by the exercise of ordinary care upon his part; and if you believe from the evidence that plaintiff at and prior to the time of the fall knew the condition of the runway, and the manner in which it was constructed and laid, or that he could have known its condition and the manner in which it was laid by the exercise of ordinary care and prudence upon his part, then the plaintiff cannot recover, and your verdict should be for the defendant.[96]

(1967) The court instructs the jury that if you believe from the evidence in this case that the proximity of said platform to the track and to the cars as they passed was plain and apparent, and the liability to injury therefrom was manifest, and that deceased knew of such proximity, or, by the exercise of care to avoid injury to himself might have known, and with such knowledge or opportunity of knowledge, remained in defendant's employ, and continued to work in the vicinity thereof without objection or protest, and without promise of alteration of the platform, then plaintiff cannot recover in this action.[97]

(1968) The court instructs the jury that if they find from the evidence that the defendant's shipping room at or about the elevator hole mentioned in the evidence was dark and unlighted; and if the jury further find from the evidence that plaintiff, before his injury knew that said room was dark and

[95] Approved in Quintana v. Consolidated Kansas City Smelting & Refining Co., 37 S. W. 369.

[96] Approved in Doyle v. Missouri, K. & T. Trust Co., 41 S. W. 255.

[97] Approved in Perigo v. Chicago, etc., R. Co., 52 Iowa, 277.

unlighted and that there was some risk or danger of falling into the elevator hole by reason of said condition of said room, while undertaking to use the elevator in the discharge of the duties of his employment; and if the jury find from the evidence that defendant was maintaining said elevator opening in said floor without causing same to be effectually barred or closed by railing, gate or other contrivance for the prevention of accidents therefrom; and if the jury find from the evidence that the plaintiff knew before his injury that defendant was maintaining said elevator opening without such guard or protection being closed; yet if the jury further find from the evidence that said condition of said room and elevator opening and the danger arising therefrom were not such as to threaten immediate injury to plaintiff while in the defendant's service in the discharge of the duty of his employment, and was not such that a person of ordinary prudence while exercising care and caution would not have undertaken to have remained in defendant's service and discharge the duties of his employment, then the fact alone that plaintiff continued in defendant's service under the circumstances will not of itself defeat the action.[98]

(1969) The court instructs the jury that, if you find that said boiler exploded because of defects in material and plaintiff knew of such defects before the explosion or might have known of same by the use of observation in the course of his employment, and by placing himself near the same was injured by the explosion; or if such boiler exploded in consequence of incompetency of the engineer and plaintiff knew of such incompetency before the explosion, then he cannot recover.[99]

Same—Operation of railways.

(1970) The court instructs the jury that if a servant re-

[98] Approved in Wendler v. People's House Furnishing Co., 165 Mo. 527.

[99] Approved in East Line & Red River R. Co. v. Scott, 71 Tex. 703.

mains in the employ of a master when he knows the performance of the duties required of him will expose him to danger on account of a failure to take certain precautions, it will be presumed that the servant voluntarily assumed the risk of such danger, unless the master has lulled the servant into a sense of security by promising to supply the necessary safeguards, and if the jury believe from the evidence in this case that plaintiff was employed as a switchman by the defendant, and that the plaintiff knew that he would be exposed to danger on account of the want of a watchman on the car which was alleged to have injured the plaintiff and caused the injuries for which he sues, the jury are instructed that plaintiff cannot recover for injuries arising from the lack of a watchman on the said car.[100]

(1971) The court instructs the jury that a person who contracts for the performance of the duties of railroad brakeman assumes such risks as are incident to their discharge from causes open and obvious, the dangerous character of which he had opportunity to ascertain, and if plaintiff was injured by a cause, the dangerous character of which was open and obvious to him, the jury should find for this defendant, although they should believe the defendant was negligent in providing appliances which caused such danger.[101]

(1972) The court instructs the jury that if a brakeman on a railroad knows that the materials with which he works are defective, and continues his work without objecting, and without being induced by his master to believe that a change will be made, he is deemed to have assumed the risk of such defects; for the continuance of the brakeman in the employment is purely voluntary and if he so continues without objection, with knowledge of defects in machinery, he is presumed to have waived the right to insist upon indemnity for injuries resulting from such defect.[102]

[100] Chicago & N. W. R. Co. v. Donahue, 75 Ill. 106.

[101] Approved in McDonald v. Norfolk & W. R. Co., 95 Va. 98.

[102] Approved in Way v. Illinois Cent. R. Co., 40 Iowa, 341.

(1973) The court instructs the jury that if the plaintiff knew of the defective condition of the brakes, if they were defective, or could have known, if they were of such a character, as an ordinarily observant person would have known, and the condition of the brakes caused the wreck, plaintiff cannot recover.[103]

(1974) The court instructs the jury that if the plaintiff knew that the inside rail of defendant's road was higher than the outside one, if such was the fact, or if the same was of that character that an ordinarily observant person would have known, and he continued in the employment of defendant or entered thereon, with knowledge of the fact, he cannot recover, if the height of the rail was the proximate cause of the injury.[104]

(1975) The court instructs the jury that if the plaintiff knew that the cross ties in defendant's roadbed were rotten, if they were rotten, or if the condition of the ties were such that an ordinarily observant person would have known before the accident, and he continued in the employment of said company after becoming possessed of such knowledge, then he cannot recover, if the condition of the ties was the proximate cause of the injury.[105]

(1976) The court instructs the jury that although you may believe from the testimony that defendant's track was in a defective condition, that there were rotten ties in the same, that the curve in the vicinity of the place of the accident, had its inside rail higher than the outside one, that there was a car in said train with defective brakes and also one was overloaded and that these facts, or any or all of them, caused the accident, yet you cannot find for plaintiff, if you further believe from the evidence that plaintiff knew, or by the exercise

[103] Approved in Gorham v. Kansas City & S. R. Co., 113 Mo. 408.
[104] Approved in Gorham v. Kansas City & S. R. Co., 113 Mo. 408.
[105] Approved in Gorham v. Kansas City & S. R. Co., 113 Mo. 408.

of ordinary care could have known of the existence of said facts.[106]

(1977) The court instructs the jury that if the alleged dangers and improper condition of the track and the situation of the car on the sidetrack was plain to be seen by plaintiff, or if he ought, as an ordinarily prudent person, to have seen or known of it, then there can be no recovery, and if he had reasonable opportunity to see or know of the situation as touching the alleged condition of the tracks and car on the sidetrack, then he is, in law, held to such knowledge; or if on or before the occasion of the injury he had knowledge or reasonable means of knowledge as a man of ordinary prudence of the condition of the track and car on the sidetrack, and incurred the danger with such knowledge or means of knowledge, then there can be no recovery.[107]

(1978) The court instructs the jury that if they shall find from the evidence that plaintiff entered the employ of defendant as a freight brakeman on or about the ——— day of ———, 19—, and continued therein in that capacity until his injury on ———, 19—, and during all that time was passing through the tunnel mentioned, generally twice a day and often more frequently and that it required only a few days to become acquainted with the tunnel and the conditions of work therein and that after such opportunity of knowing the same he continued in such employment as aforesaid, then he took the risk of such employment and the plaintiff cannot recover in this action even though the jury shall further find that the accident was caused by the defective construction of the tunnel or lack of ventilation of the same.[108]

(1979) The court instructs the jury that if you believe from the evidence in this case that plaintiff was a baggageman on the defendant's passenger train and that it was his duty

[106] Approved in Gorham v. Kansas City & S. R. Co., 113 Mo. 408.
[107] Approved in Pennsylvania Co. v. McConnack, 131 Ind. 250.
[108] Approved in Baltimore & P. R. Co. v. Maryland, 75 Md. 152.

to assist in making up the train and that he had been in the employment of defendant for over two years at the time of the injuries here sued for and had assisted in making up the train nearly every day during that time, and that the injuries here sued for were caused by the plaintiff being knocked off a car by a coal platform standing near the track and if the jury believe from the evidence that the proximity of said coal platform to the track and to the cars as they passed was plain and apparent and the liability to injury therefrom manifest, and that the plaintiff knew of such proximity or by the exercise of ordinary care to avoid injury to himself might have known and with such knowledge or opportunity for knowledge remained in defendant's employ and continued to work in the vicinity of such coal platform without objection or protest and without promise of amendment by the defendant, then plaintiff cannot recover in this action.[109]

Same—Minority of servant.

(1980) The court instructs the jury that, if you believe from the evidence that the plaintiff knew or had the same means of knowing as his employer, of the danger to which he would be exposed in performing services at said place, and further find from the evidence that the plaintiff failed to exercise that degree of care that a man of ordinary prudence would have used under the circumstances, to avoid injury from such danger, and that by reason of his omission to observe that measure of caution, he was injured, he cannot recover; unless, however, you believe from the evidence that at the time plaintiff was hurt he was a youth of immature judgment and inexperienced in the business in which he was employed and that the perils of his undertaking were not communicated or known to him, and that by reason of such immaturity of judgment and inexperience and want of information as to the perils of the employment he was incapable

[109] Perigo v. Cedar Rapids, I. & P. R. Co., 52 Iowa, 276.

of understanding the nature and extent of the hazard to which he was subjected; in which event in order to prevent a recovery by him, you must believe that he failed to exercise that degree of care that persons of his age, undeveloped judgment and want of information would ordinarily use under such circumstances. From what has been stated you will perceive that it is not the mere fact of plaintiff's minority at the time he was hurt that would relieve from the care demanded of an adult, but such immaturity of judgment, inexperience and lack of information as has been defined to you, would be necessary to relieve him from that degree of care. You are further instructed that the fact that plaintiff's father did not consent to his employment by said defendant, does not affect this case one way or the other.[110]

Promise of master to remedy defect.

(1981) The court instructs the jury that if the drawbar was defective, and the plaintiff had knowledge of it, and made objection thereto, and was induced to remain in the defendant's employment by promise or assurance of its repair, and within a reasonable time, and before its repair, and not having waived the objection, he was injured by reason of such defect, and he did not contribute to the injury, by his own fault or negligence, he will be entitled to recover, but in such case greater care will be required of him than if he had not known of the defect.[111]

Negligence of fellow servant.

(1982) The court instructs the jury that although the plaintiff assumed the risks which are ordinarily incident to the services in which he was engaged and the risk of such defective appliances as were obvious or known to him, he did not assume the risk of being injured by the negligence of other employes of the defendant, if the jury believe from the

[110] Approved in Texas & P. R. Co. v. Brick, 83 Tex. 598.

[111] Approved in Belair v. Chicago & N. W. R. Co., 43 Iowa, 662.

evidence that employes other than defendant were negligent, unless such other employes were fellow servants as defined in the instruction given upon that question.[112]

VIII. Contributory Negligence of Servant.

Care required of servant in general.

(1983) If you find under the above instructions that plaintiff and defendant were both guilty of negligence which contributed to bring about the accident to plaintiff, then plaintiff cannot recover herein and you will find for defendant. If you find that neither plaintiff nor defendant was guilty of such negligence then you will also find for defendant.[113]

(1984) The court instructs the jury that if you find from the evidence that the plaintiff at the time he received his injuries was sitting on the hand-car, and that the manner in which he was sitting was negligence, and that such negligence approximately contributed to his injury, he cannot recover in this case.[114]

(1985) The court instructs the jury that to find for plaintiff you must believe from the evidence that defendant was guilty of negligence which caused the injuries to plaintiff, and in addition that plaintiff on his part was not guilty of any negligence which contributed to bring about the accident to himself.[115]

(1986) The court instructs the jury that the defendant was under no greater obligation to care for the safety of plaintiff than he was to take care of himself; that while the company was under obligation to use care for the safety of plaintiff he was under a like obligation to use ordinary care for his own safety, and to observe the machinery with which he operated.[116]

[112] Mobile & O. R. Co. v. Healy, 100 Ill. App. 586.
[113] Gulf, C. & S. F. R. Co. v. Silliphant, 70 Tex. 623.
[114] Galveston, H. & S. A. R. Co. v. Parrish, 40 S. W. 191.
[115] Gulf, C. & S. F. R. Co. v. Silliphant, 70 Tex. 623.
[116] Approved in McDonald v. Norfolk & W. R. Co., 95 Va. 98.

(1987) The court instructs the jury that if they believe, from the evidence, that at the time the plaintiff uncoupled the cars, there was a combination car on which there was a railing, and a flat car which did not have any railing, and that the plaintiff in uncoupling the cars should have remained on the combination car, and run it out on the switch, and that if he had done so he would not have been injured, but instead of remaining on the combination car he remained on the flat car, and was thrown off the same and injured, then the jury must find for the defendant, as he was injured through his own carelessness and negligence.[117]

(1988) The court instructs the jury that if they believe from the evidence that plaintiff (was in the employ of the defendant railroad company and while so in such employment, and in the course of his duties, was struck by an engine, and that the plaintiff had actual, timely notice of the approach of the engine which struck him, that is, sufficient notice to enable him to get out of the way, by the exercise of ordinary care, whether such notice was received by him from a bystander or by hearing or seeing the engine as it approached, then it makes no difference in this case whether the bell of the engine was ringing or not).[118]

(1989) The jury are instructed, as a matter of law, that it was the duty of the plaintiff, before attempting to uncouple the car in question, to use ordinary and reasonable care to ascertain whether it was safe to do so or not while the train was in motion; and if the jury believe from the evidence, that it was not safe for the plaintiff to uncouple said car at the time he attempted it, and that the plaintiff knew or might by the exercise of ordinary care have known, that it was not safe to attempt it, then the plaintiff cannot recover, and the verdict should be for the defendant.[119]

[117] Approved in Chicago & A. R. Co. v. Rush, 84 Ill. 570.

[118] East St. Louis Connecting R. Co. v. Eggmann, 71 Ill. App. 32.

[119] Approved in Chicago, B. & Q. R. Co. v. Warner, 108 Ill. 538.

The instruction set out above was expressly approved by the

Knowledge of defects or dangers.

(1990) The court instructs the jury that the defendant was under no obligation to keep the loose boards picked up and it was plaintiff's duty to observe when and upon what he was stepping, and if his fall was due to his stepping upon a loose board near the runway, or where he was working, then your verdict should be for the defendant.[120]

(1991) The court instructs the jury that it was the plaintiff's duty to be careful, and to guard against accidents; and if you believe from the evidence that the plaintiff knew the manner in which the board upon which he claims to have stepped was laid, or if the condition of the board was apparent, and plaintiff by looking and using ordinary care, could readily have discovered the danger, then your verdict should be for the defendant.[121]

(1992) The court instructs the jury that although they may believe from the evidence that H. was not a capable man to run the mine machine referred to in the evidence in this cause, and did not run such machine in a capable manner at the time of the injury to B., yet, if they believe from the evidence that the said B. had knowledge of the danger of said machine when in motion, and could have avoided the injury to himself by the use of ordinary care upon his part, he, the said B. would be guilty of contributory negligence and the jury should find for the defendant.[122]

(1993) The court instructs the jury that it is the duty of one engaged in a hazardous employment to keep a constant lookout for the danger that besets him, and if he re-

court as applicable to the facts in the case. The instruction actually given by the court used the words, "in attempting to uncouple the car in question while the train was in motion, to exercise great care and caution to prevent being injured." While the instruction refused and instruction given have a superficial resemblance, they are in fact radically different.

[120] Approved in Doyle v. Missouri, K. & T. Trust Co., 41 S. W. 255.

[121] Approved in Doyle v. Missouri, K. & T. Trust Co., 41 S. W. 255.

[122] Approved in McVey v. St. Clair Co., 49 W. Va. 412.

ceive an injury because of a danger to which he is exposed, of which he had equal advantages and opportunities with the master to know, and fully understand, he cannot recover for an injury as a result of such danger.[123]

(1994) The court instructs the jury that if said handle was reasonably safe and suitable when the car was furnished to the plaintiff then defendant was not guilty of negligence in furnishing it. If said handle was defective as to material, rotten or out of repair when so furnished, if its defects were unknown to defendant and defendant could not by the use of reasonable diligence have discovered its said defects, then in such case defendant would not be guilty of negligence in furnishing the car with such handle. If said handle was so defective and if plaintiff did not know of the defects in it, and if he did not voluntarily take a dangerous position on said car, then he would not be guilty of contributory negligence.[124]

Injury to servant where absent from post of duty.

(1995) The court instructs the jury that, if the evidence should show that the plaintiff was injured by such explosion as alleged, yet if it also appears that plaintiff at the time of such injury, was away from the place at which his duties required him to be (if you find that he was in defendant's employment) and that he voluntarily placed himself in a position of danger and in consequence thereof received the injuries complained of, then he could not recover, no matter whether such boiler was defective or the engineer in charge was incompetent or not.[125]

(1996) The court instructs the jury that, if you find from the evidence that plaintiff was rightfully at the place of the explosion and you further find that he left his engine and went to the boiler that exploded, and you find that he had no

[123] Approved in Baltimore & O. S. W. Ry. Co. v. Spaulding, 21 Ind. App. 323.

[124] Gulf, C. & S. F. R. Co. v. Silliphant, 70 Tex. 623.

[125] Approved in East Line & Red River R. Co. v. Scott, 71 Tex. 703.

reason to believe that said boiler was in danger of explosion, and in so going near it he did what was usual in such a case on the part of trainmen, and there was no apparent danger in so doing, and it was such an act as a man of ordinary prudence and caution would commit, then the same would not defeat his right to recover if he was otherwise entitled to recover, under the evidence and the instructions herein given.[126]

(1997) The court instructs the jury that where a servant who has been assigned to work at a particular place, without any reasonable or proper cause for so doing, voluntarily goes away from his post of duty, and is injured in consequence thereof, he has no remedy against his employer. And if the jury shall believe from the evidence that plaintiff was employed by the defendant company to work at drilling earth on top of a bank at its mines, and that his duty was, with a drill, pick, or shovel, to drill a hole in said earth and that it was a safe position; and if the jury shall further believe from the evidence that the said plaintiff voluntarily, and without the direction of the defendant company or its agents, and without any reasonable or proper cause for so doing, left said position to which he was assigned, and voluntarily exposed himself to known danger, by going to a fire at which dynamite was being thawed by other servants of the defendant company, and that the said plaintiff was injured by an explosion of said dynamite at said fire to which he went voluntarily, and without the direction of the defendant company or its servants, and without any reasonable or proper cause for so doing; and if the jury further believe from the evidence that the said plaintiff in so doing was guilty of negligence which proximately contributed to his injury, then the said plaintiff cannot recover for an injury thus caused.[127]

[126] Approved in East Line & Red River R. Co. v. Scott, 71 Tex. 703
[127] Bertha Zinc Co. v. Martin's Adm'r, 93 Va. 791.

Disobedience of rules and orders.

(1998) The court instructs the jury that if they believe from the evidence that, at the time of the injury to the plaintiff, there was in force a rule of the company, known to him, that required a brakeman to use a coupling stick in coupling cars; that the plaintiff had such stick, but in disregard of such rule and without special direction so to do he made the coupling by which he was injured with his hand instead of such stick, and that if he had used a coupling stick instead of his hand, he would not have been injured, he was the author of his own misfortune, and the jury must find for the defendant.

(1999) The court instructs the jury that the plaintiff in the performance of his duties as conductor of the train of defendant, assumed all the usual and ordinary risks incident to his business, and if injured by any accident arising from these risks, the defendant is not liable to him therefor; if you believe from the testimony that plaintiff created an extraordinary risk for himself by permitting the train to run at an unusually rapid rate of speed and was injured on that account, your finding will be for defendant.[128]

(2000) The court instructs the jury, that, if you believe from the testimony that plaintiff was an experienced railroad man, both as engineer and conductor, at the time of the accident, and that he permitted the train under his charge to be run at an unusual and reckless rate of speed, and that said unusual and reckless rate of speed of the train was the proximate cause of the accident, and that, but for such rate of speed, the accident would not have happened, notwithstanding defects (if there were any) of the track or cars or manner of loading the cars of the defendant, then the plaintiff cannot recover, and your finding will be for defendant.[129]

[128] Approved in Gorham v. Kansas City & S. R. Co., 113 Mo. 408.
[129] Approved in Gorham v. Kansas City & S. R. Co., 113 Mo. 408.

Disregard of warning.

(2001) The court instructs the jury that if they believe from the evidence that B.'s death was caused directly by failing to recognize the signals to stop, if any were given, and to stop or check the speed of his train in response thereto, then your verdict must be for the defendant.[130]

IX. Evidence to Establish Liability.

Burden of proof.

(2002) The court instructs the jury that the only charge of negligence made in the petition against this defendant, which you are to consider, is concerning the removal of the brake staffs from the flat cars, which were loaded with steel, and it devolves upon the plaintiff to prove that the removal of said brake staffs was an act of negligence. The jury cannot presume that it was a negligent act from the fact, if it be a fact, that the cars escaped from the side track onto the main track, and there collided with B.'s train.[131]

(2003) The court instructs the jury that the burden of proof is upon the plaintiff and he cannot recover unless he proves to your satisfaction and by the greater weight of evidence, each and every fact material of his case.[132]

(2004) The court instructs the jury that while an employe of a railroad company assumes the risks ordinarily incident to the service in which he is employed, yet he does not assume the risks which result from the negligence of the master. Plaintiff must, however, in order to recover, show to the jury by a preponderance of the evidence that his injuries were caused as alleged in the declaration by defendant's negligence in permitting its cars to be run, etc., and that such injury, if any, was caused by such negligence, if it existed and that plaintiff did not and by the exercise of ordinary care and

130 Approved in Browning v. Wabash W. Ry. Co., 124 Mo. 55.

131 Approved in Browning v. Wabash W. Ry. Co., 124 Mo. 55.

132 Approved in Doyle v. Missouri, K. & T. Trust Co., 41 S. W. 255.

diligence could not know of such negligence. If plaintiff has not shown this by a preponderance of evidence, then you will find for the defendant.[133]

(2005) The court instructs the jury that, if you find from the evidence that the plaintiff was injured in the manner as alleged, and that at the time of the injury he was in the employ of the defendant as night watchman, and that his duties as such were performed at a different place from that at which the injury occurred, then before plaintiff can recover, he must show that he was properly at the place where the injury occurred, and that his presence there was in the performance of a service for defendant.[134]

(2006) The court instructs the jury that it is for them to determine upon all the facts and circumstances in evidence whether the explosion of the boiler was or was not caused by the want of a reasonable degree of skill of one in the employ of said company, or whether said explosion was or was not caused by the failure of said employe in charge of said boiler to use a reasonable degree of care and caution to prevent said explosion.[135]

(2007) The court instructs the jury that to recover damages in this action, plaintiff must not only show by a preponderance of evidence that there was negligence on the part of defendant, but plaintiff must also show by a preponderance of testimony that the injury complained of was the result of such negligence. Now the only injury of which plaintiff complains in this case is that defendant did not provide a ——— on the machine upon which plaintiff was working known as a ——— and if therefore plaintiff has failed to show by a preponderance of the testimony that defendant failed to provide a ——— as alleged and that such

[133] International & G. N. R. Co. v. Emery, 40 S. W. 149.

[134] Approved in East Line & Red River R. Co. v. Scott, 71 Tex. 703.

[135] Approved in Smith v. Warden, 86 Mo. 382.

failure was negligence and that such negligence caused the injury here sued for, the verdict will be for defendant.[136]

Sufficiency of evidence.

(2008) The court instructs the jury that whenever a claim for damages is asserted the injury must be shown by the plaintiff to have been caused by the negligence of the defendant, and the happening of the accident, without additional proof that it was caused by the negligence of the defendant, is not sufficient to establish the liability of defendant.[137]

X. Liability for Injuries to Third Persons.

In general.

(2009) The court instructs the jury that if they shall believe from the evidence that at the time of the collision, which resulted in the injuries to the plaintiff of which he complains in this action, E., as section master of the defendant company on that part of said company's road on which the collision occurred, was on the hand-car involved in said collision, and in the control and management of the same, and that the plaintiff was then and there on said hand-car by permission of said E., and without knowing that it was contrary to the rules of the defendant company for him to be on said hand-car, and that the injuries sustained by the plaintiff in said collision resulted from the gross negligence of the defendant company, or of its agents or any of them, whilst the plaintiff was on said hand-car, then the court instructs the jury that the defendant company is liable to the plaintiff in this action for said injuries.[138]

(2010) The court instructs the jury that if they believe from the evidence that when the collision occurred between the hand-car and the train, which resulted in the injuries to the plaintiff for which he seeks to recover in this action, E.

[136] Lowrimore v. Palmer Mfg. Co., 60 S. C. 153.

[137] Approved in Richmond & D. R. Co. v. Burnett, 88 Va. 538.

[138] Approved in Tyler v. Chesapeake & O. R. Co., 88 Va. 389.

was the section master of the defendant company on that part of said company's road upon which said collision took place, and that, as such section master, he was then on the aforesaid hand-car, and in the actual control and management of the same and of the laborers thereon, and was in the habit of employing and discharging and controlling the laborers under him, and did, on the day upon which the collision occurred, and but an hour or two before its occurrence, agree with the plaintiff that he would take him on said hand-car with his force from S. to L., a point on defendant's road, three miles west of said starting point, and bring him back on said hand-car in a short time on the same day, upon the condition and understanding that the plaintiff would aid in loading scrap iron along the track at and near L., on said hand-car, to be brought to S., and that the plaintiff, in ignorance of any regulation of the company which forbade his being on the hand-car, so under the control of said E., did go thereon to L., and did, according to his undertaking, aid in loading scrap iron on said hand-car, and that, in returning from L. on said hand-car, the plaintiff, by reason of the gross negligence of the defendant company, or of its agents and representatives, in permitting the aforesaid collision to take place, was seriously and permanently injured, then the court instructs the jury that the plaintiff is entitled to recover of the defendant for such injuries.[139]

(2011) The court instructs the jury that if you find from the evidence that certain persons were employed to run and operate a train upon the railroad of defendant, and that these persons while so employed and while engaged in running a train, committed an assault and battery upon the person of plaintiff, he, the plaintiff, at the time not being a passenger upon or in any way connected with defendant or its train, but was simply a stranger or citizen passing on or along its railroad track, or that the persons so employed attempted by

[139] Approved in Tyler v. Chesapeake & O. R. Co., 88 Va. 389.

force and did kidnap him, and this was done without any direction or authority or knowledge of the defendant other than such employment, then the defendant is not liable for any damages sustained by reason of such acts.[140]

(2012) The court instructs the jury that if they believe that the motorman in charge of the defendant's car after he had seen the plaintiff's carriage and had completely stopped his car, wantonly and maliciously and to gratify some private purpose and not because it was necessary that he should again start said car, in pursuance of his employment again started said car and ran into the plaintiff's carriage and frightened the plaintiff's horse and caused the accident, that then the defendant is not responsible for such acts on the part of the motorman, and the verdict of the jury must be for the defendant.[141]

(2013) The court instructs the jury that if they believe that the plaintiff drove upon that portion of ——— street exclusively used by the defendant's cars and occupied by its "T" rail tracks and stone ballast on a dark and rainy night, and drove his horse down said track for over 200 yards, and that the motorman in charge of the defendant's car, after he discovered that the plaintiff was on the track, used every due and proper effort to stop his car before he should strike the plaintiff's carriage and frightened the plaintiff's horse, which ran away and caused the accident, then there is no negligence on the part of the defendant, and the verdict of the jury must be for the defendant.[142]

[140] Approved in Porter v. Cedar Rapids, I. & P. R. Co., 41 Iowa, 358.

[141] Approved in Baltimore Consolidated Ry. Co. v. Pierce, 89 Md. 495.

[142] Approved in Baltimore Consolidated Ry. Co. v. Pierce, 89 Md. 495.

CHAPTER XCIII.

MESNE PROFITS.

Trespass for mesne profits of mining land recovered in former ejectment suit, 2014-2019.

Trespass for mesne profits of mining land recovered in former ejectment suit.

(2014) The court instructs the jury that whether fast or loose, all the machinery of an ore bank which is necessary to constitute it such and without which it would not be an ore bank equipped and ready for use as such, are a part of the freehold and a recovery of the land by the plaintiffs in the action of ejectment gave to them the ore banks on it with all the machinery, whether fast or loose, and necessary to constitute them such equipped and ready for use.[1]

(2015) The court instructs the jury that if they believe from the evidence that the machinery, building and appliances for mining ore placed by the defendants upon the land of the plaintiffs were for temporary use only, and not structures of a lasting and permanent character, then they are not such improvements as entitle defendants to credit against plaintiff's demand in this action, but the jury are instructed that such structures are of a lasting and permanent character if they are annexed to and made a part of the freehold and give an increased value to it.[2]

(2016) The court instructs the jury that the royalty named in the lease given in evidence in this case is not the absolute measure of the value of the ore in place on the lands of the plaintiffs, but is the measure of such value only in connection with the location of the lands and their natural surroundings. The value of the ore in place you will ascer-

[1] Ege v. Kille, 84 Pa. 333.

[2] Ege v. Kille, 84 Pa. 333.

tain in estimating the cost of mining, cleansing and putting the ore into market and then deducting this cost from the value of the ore in market, and the difference will be the value in place.[3]

(2017) The court instructs the jury that if they believe from the evidence that the defendant was not skilled in mining ore and he gave no personal attention to mining operations and that the price paid by him for superintending such operations was ——— per month and that such price was extravagant and unnecessary, then the jury are instructed that no extravagant and unnecessary expenditures should be allowed to the defendant, but only such or so much thereof as are proper and legitimate expenditures should be taken into account in ascertaining the real or legitimate cost of mining or the value of the ore in place.[4]

(2018) The court instructs the jury that plaintiffs are entitled to recover from defendants in this case as damages the value in place of all the ore, timber, etc., taken from the premises described in the declaration by the defendants or by their lessees with interest from the time it was taken, and the defendants are entitled to credit against the value of the ore so taken only for such improvement upon plaintiffs' land by defendants or by their lessees as the jury may believe are of a lasting and permanent character, adding a permanent increase of value to the land and being of a lasting and permanent benefit to it and the jury are instructed that the improvements are of a lasting and permanent character when they are annexed to and made part of the freehold and give an increased value to it. The increase is a permanent increase if the value of the land has been increased by the permanent improvements made and put upon it and if such

[3] Ege v. Kille, 84 Pa. 333.
[4] Ege v. Kille, 84 Pa. 333.

improvements have increased the value of the land, they are of lasting and permanent benefit to it.[5]

(2019) The court instructs the jury that the engines, boilers, washers, pans, drums, pumps, ropes, cars and all other matters necessary to convert unimproved land into ore banks opened and ready to operate as such, are permanent improvements to the property, whether they are leased a limited number of years or not, provided they be necessary parts of the machinery and fixtures erected and put upon the land for that purpose and provided also such machinery and fixtures were annexed to the freehold and made part of it and give an increased value to the land, and if, therefore, you find these things to be permanent improvements and giving an increased value to the land, the defendants will be entitled to the difference in value between the property as it was without them and as it was when the plaintiffs were put in possession of it on ———, 19—, with them in its distinctive character as ore banks ready to operate, as a defense to the value of the ore in place, and before it was taken from the ground, just to the extent, however, that such difference of value was produced by such improvements made and put upon the premises by the defendants and their lessees.[6]

CHAPTER XCIV.

MINES AND MINERALS.

Overlapping claims, 2020.
Liability for removal of supports, 2021.
Injury to employe caused by insufficient timbering, 2022.
Contract to roast ore, 2023, 2024.

Overlapping claim

(2020) The court instructs the jury that where two min-

[5] Ege v. Kille, 84 Pa. 333.
[6] Ege v. Kille, 84 Pa. 333.

ing companies take up adjoining claims, and the one last taken up overlaps the other, and neither company is working that portion of the claim which overlaps the other, but are working in different portions of their respective claims, the fact that the locators of the last claim located have been in possession of their claim for five years, does not divest the owners of the first claim of the right to their claim to the extent of the original boundaries, and such a possession by the locators of the last claim located is not adverse to the possession of those who located the first claim.[1]

Liability for removal of supports.

(2021) The court instructs the jury that where a man has the title to a coal mine and leases it in general terms to another and the lessee operates it with full control over the mine as to the manner of operating, and such lessee withdraws the supports, or fails to leave sufficient support, he is liable for a subsequent subsidence and not the owner of the coal mine, but if the lease provides how the lessor shall mine the coal, and the extent of the support that is to be left, designates the size of the rooms and the extent of the pillars or stumps or ribs that are to be left, and the lessee accepting the condition mines the coal in accordance with the terms specified in the lease, leaving the support that the lessor specifies, and that is insufficient, and the surface subsides, then the lessor will be liable, because he in his lease had indicated the support that ought to be left, and he would be liable as well as the lessee who took out the coal; or if after a lease is made, which might be general in its terms without any qualification as to the manner in which coal should be taken out, the lessee and lessor would agree and have an understanding that certain coal should be taken out, or certain supports then

[1] Approved in Maine Boys' Tunnel Co. v. Boston Tunnel Co., 37 Cal. 40.

existing should be removed, and they were removed in consequence of that mutual agreement, then the lessor or the owner of the vein of coal would be liable as well as the lessee.[2]

Injury to employe caused by insufficient timbering.

(2022) The court instructs the jury that the law makes it the duty of the owner, agent, or operator of every coal mine to keep a supply of timber constantly on hand of sufficient lengths and dimensions to be used as props and cap pieces, and to deliver the same as required with the miner's empty car, so that the workmen may at all times be able to properly secure said workings for their own safety, and if such operator fails willfully so to do, and by reason of such failure a person employed about the mine is killed, the owner or operator is liable to the widow of the person killed for damages not to exceed the sum of $5,000.[3]

Contract to roast ore.

(2023) The court instructs the jury that if the plaintiffs were not ready on the first of ———, 19—, to comply with their part of the contract; or if the ore was then and thereafter and until ———, 19—, being mined and received in less quantities and in a manner otherwise than as the contract provided for and if plaintiffs acquiesced therein, or if the plaintiffs during the time, did not complain and did not give the defendant reasonable notice that they were standing on their contract and that he would be expected to receive daily, Sundays excepted, from 50 to 60 tons of ore, then the plaintiffs would not be entitled to recover damages on this account for defendant's failure to receive such amount of ore.[4]

(2024) The court instructs the jury that if the plaintiffs

[2] Approved in Kistler v. Thompson, 158 Pa. 139.

[3] Approved in Mt. Olive & Stanton Coal Co. v. Rademacher, 190 Ill. 538.

[4] Approved in Eaves & Collins v. Cherokee Iron Co., 73 Ga. 459.

while the ore was being delivered, acquiesced in the manner of weighing the ore and in the use of the defendant's scales in ——— and did not object thereto or give defendant reasonable notice that the scales would be required as provided by the contract, at the chute or ore bank, then they were not entitled to recover the damages on this account, nor would they be entitled to damages on this account, if they have received credit for all the ore actually delivered. The defendant in such case was bound to furnish the weights of the ore to the plaintiffs, if he undertook to weigh it for them, and if he did so correctly, no damages can be recovered on this account. If he did not, they can recover for any ore not credited to them by the defendant.[5]

CHAPTER XCV.

MUNICIPAL CORPORATIONS.

I. In General.

Enforcement of ordinances, 2025.
Action for violation of ordinance which establishes a market place and prohibits sales outside of market, 2026.

II. Defective Streets and Sidewalks.

General instructions on behalf of city, 2027-2030.
General instructions on behalf of plaintiff, 2031-2039.
Care required in general, 2040-2052.
Places required to be kept in repair, 2053-2057.
Same—Acceptance of street by city, 2058, 2059.
Same—Sidewalks built by third persons, 2060, 2061.
Same—Bridge built by private individual, 2062.
Latent defects, 2063, 2064.
Care required with regard to streets undergoing improvements, 2065.
Defective bridges and approaches thereto, 2066-2069.
Care required with regard to sidewalks, 2070, 2071.
Sidewalks in suburbs, 2072.
Defective crossings, 2073.

[5] Eaves & Collins v. Cherokee Iron Co., 73 Ga. 459.

Excavations and holes in streets, 2074, 2075.
Openings into sewers and drains, 2076, 2077.
Necessity of barriers, 2078, 2079.
Overhanging signs, 2080.
Liability of city for injuries caused by objects dropped from platform, 2081.
Insufficient light, 2082.
Ice and snow on sidewalks, 2083-2085.
Condition of street before or after injury, 2086, 2087.
Effect of defects other than one causing injury, 2088.
Notice, 2089-2095.
Notice of unlawful obstruction of highway, 2096.
Constructive notice, 2097-2102.
Same—Overhanging sign, 2103.
Negligence of traveler, 2104-2112.
Same—Circumstances increasing degree of care to be exercised, 2113-2117.
Same—Duty of traveler to take safer way, 2118-2120.
Same—Knowledge by traveler of defects, 2121-2123.
Same—Burden of proof, 2124.
Injuries to children, 2125, 2126.
Recovery over, 2127.

III. Liability with Respect to Drains and Sewers.
Liability for flooding of premises caused by defective drains and sewers, 2128-2130.
Diversion of surface water by change of grade, 2131, 2132.

IV. Enforcement of Claims Against Municipalities.
Conditions precedent—Presentation of claim to council, 2133.
Sufficiency of notice to city of intention to sue, 2134.

I. In General.

Enforcement of ordinances.

(2025) The court instructs the jury that under the charter of the plaintiff, the mayor and the aldermen of plaintiff had the power and authority to pass the ordinances which have been introduced in this case, and such ordinances are valid and binding upon the defendant in its use and occupancy of the streets of the plaintiff, if the jury believes from the evidence that said ordinances were properly passed and promulgated.[1]

[1] Brasington v. South Bound R. Co., 62 S. C. 325.

Action for violation of ordinance which establishes a market place and prohibits sales outside of market.

(2026) The court instructs the jury that if they believe from the evidence that defendant did, as charged in the complaint in this cause, sell fresh meats in said city outside of the market established by the city and within five blocks of the same, in less quantities than by the ——— they will find the defendant guilty and fix his fine at ———, provided the jury further believe from the evidence that the city council passed the ordinance establishing said market place, which ordinance purports to have been read to the jury in this cause, and provided they believe from the evidence that the city council caused the said ordinance to be published in a newspaper in the city of ——— in the manner required by the city charter.[2]

II. Defective Streets and Sidewalks.

General instructions on behalf of city.

(2027) The court instructs the jury that if they believe from the evidence that the place in the sidewalk where the accident occurred, which is alleged to have caused the injuries here sued for, was properly and safely constructed, and up to the time of the accident appeared to be in a safe condition, and that the officers of the defendant had no actual knowledge of any defect, and that the defendant's officers had exercised reasonable care to discover defects, defendant will not be liable.[3]

(2028) The court instructs the jury that the plaintiff in his petition alleges in substance that the defendant is a municipal corporation, and that it was the duty of defendant to keep the streets in repair and safe, one of its streets being as alleged, called ——— street, in the defendant city; that the said defendant or city failed to construct a sidewalk in said

[2] City of Peoria v. Calhoun, 29 Ill. 317.
[3] City of La Salle v. Porterfield, 138 Ill. 114.

street of sufficient scantling and boards and that work was unskillfully performed; that both in material and workmanship it was insufficient, unsafe and dangerous for public travel, and that said defendant knowingly permitted said sidewalk to be and remain out of repair in allowing boards on said sidewalk to become loose and unfastened; and further alleges that on or about the ——— day of ———, 19—, while plaintiff was walking on said sidewalk, in the exercise of ordinary care and caution, unfastened boards in said sidewalk tipped up under his feet causing him to fall with violence upon said sidewalk, by reason of which he received the injuries complained of to the damage of plaintiff as he alleges in the sum of ———. The defendant answering the petition denies each and every allegation thereof except that defendant is a municipal corporation as alleged, which defendant admits. Now, the court instructs the jury that, in order for the plaintiff to recover in this action, he must satisfy the jury from the evidence that he received his injuries (if you find he received any injuries) from defects in the sidewalk of the defendant city, at the place and of the character and in the manner set out in his petition, and that such defects were of a character that they could be discovered by the exercise of ordinary care and diligence.[4]

(2029) The court instructs the jury that if they believe from the evidence that the alleged injury to plaintiff was the result of a mere accident and if they further believe from the evidence that the negligence of the defendant in no way contributed to the injury, they should find for defendant.[5]

(2030) The court instructs the jury that the defendant is not liable in this action, although the plaintiff shows that he was using due care, unless he also shows, by a preponderance of evidence, that the defendant was guilty of a lack of ordinary care. The negligence of the city, if any, was in per-

[4] Approved in Kansas City v. Bradbury, 45 Kan. 381.
[5] City of Chicago v. Sheehan, 113 Ill. 658.

mitting the ——— spoken of by the witnesses to obstruct the free use of the sidewalk, if it did so obstruct it, without any guard around it, or light, or any other reasonable means being used to protect passers-by from injury or give them warning of danger. The degree of care required of the city with regard to its streets and sidewalks is ordinary care, that is, such care, "as men of ordinary prudence use for themselves." Where a municipal corporation exercises, in maintenance of its streets and sidewalks, ordinary care, no action will lie for an injury sustained by a person, although in the lawful use of streets or sidewalks. Ordinary care does not require the highest degree of diligence, but does require that degree of diligence which, under like circumstances, an ordinarily prudent man would exercise with respect to his own affairs. If the city of ——— did use that degree of care which an ordinarily prudent man would have done, your verdict should be for the defendant. So far as the rights of the parties of this action are concerned, it is your sworn duty to try the case as though it was one between individuals because the defendant is entitled to be treated precisely as an individual, and no inferences or presumptions are to be drawn or indulged against it that would be improper in an action between two men.[6]

General instructions on behalf of plaintiff.

(2031) The court instructs the jury that if they believe from the evidence that plaintiff was injured by reason of a defect in a street, as alleged by the declaration, and that plaintiff was guilty of no fault or negligence and the accident was one which common and ordinary prudence might have avoided, and that there was negligence on the part of defendant in permitting the alleged defect in the street, they should find a verdict for plaintiff.[7]

[6] Approved in City of Indianapolis v. Gaston, 58 Ind. 224.

[7] City of Rock Falls v. Wells, 59 Ill. App. 155.

(2032) The court instructs the jury that if plaintiff fell by reason of loose planks or other defects in the walk and if the defects had been there long enough so that the officers of defendant either actually knew of the condition of the walk or should have known its condition by the exercise of ordinary care, and the plaintiff was free from any negligence on his part, he would be entitled to recover.[8]

(2033) The court instructs the jury that it is the duty of the city to make and keep its sidewalks reasonably safe for public travel, and that if it fails in the discharge of this duty it is liable to persons sustaining injuries because of such failure. And if the jury believe from the evidence that the sidewalk in question where the plaintiff fell and sustained the injuries complained of in his declaration, was not in such reasonable repair, then they must find for the plaintiff the damages they believe him to have sustained, unless they shall also believe from the evidence that the plaintiff, by his own negligence or want of ordinary care and caution, so far contributed to the misfortune that but for such negligence or want of ordinary care and caution on his part the misfortune would not have happened.[9]

(2034) The court instructs the jury that if the jury believe from the evidence that the sidewalk where the plaintiff was injured was uneven, out of repair or fit condition for any reason, and dangerous to persons passing along the same with ordinary care, and that the defendant, or its officers or agents knew, or ought to have known, of its condition, and that the plaintiff, in passing along the said sidewalk with such care as an ordinarily prudent man would have observed, fell thereon by reason of its defective condition, and was injured, then they must find for the plaintiff.[10]

(2035) The court instructs the jury that it is the duty of

[8] Approved in Fee v. Columbus Borough, 168 Pa. 382.

[9] Approved in Gordon v. City of Richmond, 83 Va. 436.

[10] Approved in Gordon v. City of Richmond, 83 Va. 436.

the city of ——— to keep such streets and sidewalks as are constructed in the same for the convenience of passengers and foot travelers open and in repair and free from nuisances. And if the evidence satisfies the jury that the sidewalk, as alleged in the petition of plaintiff, was out of repair or improperly constructed, and in such condition as to render passers over the same liable to fall or otherwise get injured, and that in consequence thereof the plaintiff, in passing over the same without negligence or imprudence on his part which contributed to the injury complained of, received such injury, the jury will find for the plaintiff.[11]

(2036) The court instructs the jury that if they find from the evidence that the injury complained of was suffered, and that it was occasioned by a fall upon the sidewalk, as charged in the petition of plaintiff, and that the sidewalk at the place where the fall occurred was in an unsafe and dangerous condition for the passage of travelers on foot, and that the accident occurred in consequence of such unsafe condition of the sidewalk, and that the plaintiff could not have known and guarded against the damages by the use of ordinary care and prudence, then the jury will find for the plaintiff, if they find that the negligence of plaintiff did not contribute to the injury.[12]

(2037) The court instructs the jury that, if the preponderance of the credible evidence in the case satisfies you that the plaintiff was free from any want of due care or attention that contributed to cause the injury, and further satisfies you that the city was guilty of negligence that was the proximate or near cause of the injury, and liable through having notice through its proper officer or officers, and not repairing or removing the dangerous character of the walk after a reasonable time elapsed after such notice. then you will allow him such damages as will fully compensate him

[11] Approved in Rice v. City of Des Moines, 40 Iowa, 638.
[12] Approved in Rice v. City of Des Moines, 40 Iowa, 638.

for his injury, including his suffering, mental and bodily pain, doctor's bills, nursing, and loss of time as shown by the evidence in the case.[13]

(2038) The court instructs the jury that the city is liable, not only for injuries occasioned by negligently constructing defective sidewalks on its streets or by causing such defects in them after they are constructed but also for negligently permitting them to remain in a dangerous or unsafe condition, no matter how such condition was caused. Any person traveling upon a street has a right to use any portion of the street or sidewalk for that purpose not already otherwise in use, and a person traveling upon a street or sidewalk of a city, has a right to assume that such street or sidewalk is in a safe condition, and to act upon that assumption, relying upon the belief that the city has performed its duty and placed and maintained such street or sidewalk in a safe condition.[14]

(2039) The court instructs the jury that the defendant is bound to use reasonable care and precaution to keep and maintain its streets, bridges and sidewalks in good and sufficient repair to render them reasonably safe for all persons passing on or over the same, and if the jury believe from the evidence that the defendant, the city of ———, failed to use all reasonable care and precaution to keep its bridges and sidewalks in such repair, and that the injury complained of resulted from that cause, as charged in the declaration, and that the plaintiff sustained damage thereby, while exercising such a degree of care and caution as under the circumstances might reasonably be expected from one of her age and intelligence, then she is entitled to recover of the defendant in this suit.[15]

[13] Munger v. Waterloo, 83 Iowa, 559.

[14] Approved in Kansas City v. Bradbury, 45 Kan. 381.

[15] City of Roanoke v. Shull, 97 Va. 419.

Care required in general.

(2040) The court instructs the jury that the opening and repairing of streets is a matter of discretion in the city government, but when it undertakes to open or construct streets and travel ways, it must so construct them as to render their use reasonably safe to such persons as are naturally expected to use such ways, using such care as such persons ordinarily exercise.[16]

(2041) The court instructs the jury that it is the duty of the defendant city to keep its sidewalks in safe condition and free from defects and obstructions dangerous to persons passing along the same with ordinary care; and the defendant is liable to a person who sustains injury, without fault on his part, by reason of its neglect so to do.[17]

(2042) The court instructs the jury that it is the duty of towns to keep ways safe and convenient for travelers on foot or in carriages, at all seasons of the year. These highways are of different widths.[18]

(2043) The court instructs the jury that a municipal corporation is bound to keep its streets, sidewalks and bridges in a safe condition for travel in the ordinary modes, by night as well as by day, and if it fails to do so, it is liable for injuries sustained in consequence of such failure.[19]

(2044) The court instructs the jury that municipal corporations are bound to keep their streets and sidewalks in a reasonably safe and suitable condition of repair for public travel by night and by day; accidents may happen notwithstanding the utmost diligence and care and the corporation does not warrant against accidents. The amount of care and diligence to be reasonable may vary with the cir-

[16] Approved in City of Galveston v. Posnainsky, 62 Tex. 122.

[17] Approved in Gordon v. City of Richmond, 83 Va. 436.

[18] Approved in Whitford v. Inhabitants of Southbridge, 119 Mass. 564.

[19] Mayor, etc., of the City of Rome v. Dodd, 58 Ga. 238.

cumstances of each case, but in all cases they must be relative to the risk to be reasonable care and diligence; when this is done, the corporation has performed its duty to the public.

(2045) By reasonable and ordinary care and diligence is meant that degree of care and diligence which an ordinarily careful and prudent man would be expected to use under similar circumstances.[20]

(2046) The court instructs the jury that the defendant has the entire control of streets within its corporate limits and has power to provide for and enforce the manner in which said streets are to be kept and is liable to travelers on said streets for any damage arising, without the fault of the one injured, from the placing in the street, such obstructions as to render the travel upon said street hazardous to the persons or property being conveyed or passing such streets.[21]

(2047) The court instructs the jury that the defendant is bound to use reasonable care and precaution to keep and maintain its streets and sidewalks in good and sufficient repair to render them reasonably safe for all persons passing on or over the same; and if the jury believe from the evidence that the defendant failed to use all reasonable care and precaution to keep its sidewalks in such repair and the injury complained of resulted from that cause as charged in the declaration and that the plaintiff sustained damage thereby, without negligence on his part, then he is entitled to recover in this suit.[22]

(2048) The court instructs the jury that if the streets and sidewalk alleged by the declaration in this case to be defective, and by reason of such defects to have caused the injury sued for, were within the corporate limits of the defendant, and if they were opened up as a street and public highway for the use of travelers and were under the control of the de-

[20] Approved in Kansas City v. Bradbury, 45 Kan. 381.

[21] Approved in City of Galveston v. Posnainsky, 62 Tex. 122.

[22] Approved in Moore v. City of Richmond, 85 Va. 538.

fendant, then the law imposed upon the defendant the duty to keep said street and sidewalk in a reasonably safe condition for persons using ordinary care, and plaintiff had the right to assume and believe that the street and sidewalk at the place mentioned in the declaration was at the time of the injury in a reasonably safe condition for his use as a traveler while in the exercise of ordinary care.[23]

(2049) The court instructs the jury that, before the plaintiff can recover a judgment in this action it must appear by a preponderance of the evidence (1) that plaintiff was injured as a result of a defect or excavation in the sidewalk on ——— street in the defendant city, as alleged in the declaration, and that such excavation was left in an unsafe condition; and (2) that the defendant city or its officers were negligent in permitting said sidewalk to remain in said unsafe condition at the time said plaintiff is alleged to have been injured. To charge the defendant with negligence it must appear that the proper officers of the city had notice of the unsafe condition of the sidewalk in time to have prevented the injury to plaintiff, by falling into said excavation, or that by the exercise of reasonable and ordinary care and diligence they could have known of the unsafe condition of said sidewalk in time to have prevented such injury. By reasonable and ordinary care and diligence is meant that degree of care and prudence which an ordinarily careful and prudent man would reasonably be expected to use under similar circumstances.[24]

(2050) The court instructs the jury that the city of ——— is not an insurer, nor a warrantor of the condition of its streets and sidewalks, nor is every defect therein, though it may cause the injury sued for, actionable. It is sufficient to relieve it from liability, if the streets and side-

[23] Approved in Foley v. City of Huntington, 51 W. Va. 396.
[24] Approved in Kansas City v. Bermingham, 45 Kan. 212.

walks were in a reasonably safe condition for travel as well by night as by day. If, in this case, it is shown by the evidence, that at the place where the plaintiff met with his injury, the sidewalk was in a reasonably safe condition for travel, your verdict should be for the defendant.[25]

(2051) The court instructs the jury that the defendant is not required by law to construct its sidewalks so as to render them absolutely safe, as for instance, the defendant cannot be required to absolutely secure from an accident people who may be temporarily blinded from any cause and who while in such a condition see fit to use the streets without guide or assistance.[26]

(2052) The court instructs the jury that it is admitted that the place where the accident happened is within the limits of the city of ——— and is used by the public as an approach to the W. county bridge, which is a public bridge owned by W. county; but these facts do not of themselves make the city liable to maintain and repair said premises as a public street, or to pay damages for injuries which may happen by reason of the insufficiency or want of repair of said approach. It must appear further that the approach or walk thereon in question is a public street or walk within the limits of said city, which it is liable to maintain, which it had power and authority to adopt, and had adopted prior to the accident, and which had become a public highway or walk in some way known to the law; and further that the walk was so poorly or defectively constructed or in such condition as to be unsafe for persons who might be passing over it in the nighttime; and of the sufficiency or insufficiency of the walk you are the judges.[27]

Places required to be kept in repair.

(2053) The court instructs the jury that if the jury are

[25] Approved in City of Indianapolis v. Gaston, 58 Ind. 224.
[26] Smith v. City of Gilman, 38 Ill. App. 393.
[27] Bishop v. City of Centralia, 49 Wis. 669.

satisfied from the testimony, that the apron or bridge where the plaintiff fell and broke his leg has been there, and had been there a long time, say a year or six months, before the accident occurred, without any objection on the part of the city, then the city is presumed to have acquiesced in the structure and to have adopted it, and must be held liable for damages by reason of defects, just the same as if the city authorities had actually ordered it to be placed there.[28]

(2054) The court instructs the jury that a town is not bound to work and prepare for public travel the whole of the land within the limits of the way, but only such portions as are reasonably necessary for that purpose. And a town is not necessarily chargeable with damage arising from every defect existing within the located limits of a highway. Nor would it be liable for obstructions or defects in portions of the highway not a part of the traveled path, and not so connected with it that they would affect the safety or convenience of those traveling on the highway and using the traveled path; nor would the town be legally liable when an injury was sustained by a party using the road for the purpose of passing from his own land, although it was caused by a defect within the limits of the highway, if it was outside the part of the road used for public travel.[29]

(2055) The court instructs the jury that the town is not bound to prepare for abutters the means of passing from their estates to the adjoining highway, or of crossing from that part of the highway, not appropriated to travel, to that part which is so appropriated.[30]

(2056) The court instructs the jury that it was the duty of the owner to keep and maintain safe and convenient, for

[28] Approved in Johnson v. Milwaukee, 46 Wis. 572, 573; 2 Thomp. Tr. § 1760.

[29] Approved in Whitford v. Inhabitants of Southbridge, 119 Mass. 564.

[30] Approved in Whitford v. Inhabitants of Southbridge, 119 Mass. 564.

the public travel, those parts of the highway which were the traveled paths and held out to the public as intended and designed by the defendant for that purpose, and were so used. The traveled path is that which, with the knowledge and acquiescence of the town, is used for public travel within the located limits of the highway.[31]

(2057) The court instructs the jury that it is a question for the jury whether the foot path, on which the plaintiff alleges he met with the injury here sued for, was so connected with the wrought part of the road, or with the carriage way, and so used for travel, as to make the town liable for its condition. From the length of time this path had been there in its then situation, and from the public notoriety of the fact, the jury may find whether this foot path, by long-continued public use, with the knowledge and acquiescence of the town, was recognized as a part of the wrought and finished track.[32]

Same—Acceptance of street by city.

(2058) The court instructs the jury that if they find from the evidence that ——— street (so called) was laid out by one S., in or about the year ———, upon a piece of ground having a natural watercourse, which crossed said so-called street, and that the defendant had not before or at the time of the happening of the accident complained of in this case, either actually or impliedly accepted or adopted said so-called street as one of the public streets or highways of the defendant, that is to say, by formal resolution, order or ordinance, or by any acts of repair or recognition of said street as a street, in the appropriation of money for, or expenditure of money thereon, or by any work or labor thereon by it or its agents or servants, with its approval or acquiescence, then

[31] Approved in Whitford v. Inhabitants of Southbridge, 119 Mass. 564.

[32] Approved in Whitford v. Inhabitants of Southbridge, 119 Mass. 564.

the plaintiff cannot recover under the pleadings in this case, although the jury may further find that said street so called was used by persons passing on foot over it in going to and from their respective homes or places of business and although the jury may further find that one ——— about ——— years ago, voluntarily for his own convenience, but without authority from the defendant or its agents, placed ——— across said watercourse, thereby making a temporary bridge across the same, and which was afterwards crossed by such persons as had occasion to use said street in crossing said watercourse and that the plaintiff ——— while using due care and caution on her part in the act of crossing said temporary bridge sustained the injuries complained of in this case.[33]

(2059) The court instructs the jury that to show an acceptance by the public, binding upon the city, it is not necessary to show any formal action of the council to that effect. If the jury find from the evidence that the city of ——— expended money in the repair of the bridge and assumed and exercised control and supervision of the same, and that it was upon a public thoroughfare in the city, this is evidence tending to show an acceptance and assumption of the bridge by the city.[34]

Same—Sidewalks built by third persons.

(2060) The court instructs the jury that if the defendants had themselves constructed this sidewalk, they would of course have been responsible to keep it in repair. But if it had been constructed by others, there may be, on the part of the town, such an adoption of the acts of those who constructed it, and such a long-continued public and notorious use and enjoyment of the sidewalk as to amount to a recognition of

[33] Approved in Kennedy v. Mayor, etc., of Cumberland, 65 Md. 514. Whether there was an acceptance of the street by the city was a question of law.

[34] Approved in Shartle v. Minneapolis, 17 Minn. 308, 316; 2 Thomp. Tr. § 1760.

it as a wrought and completed part of the way, and this is a question of fact for the jury.[35]

(2061) The court instructs the jury that if they believe from the evidence that the sidewalk, the alleged defects in which are said to have caused the injury here sued for, was constructed by the adjacent lot owners, and appeared to be in safe condition, the defendant cannot be held liable, unless the defendant had actual notice of the defect in the sidewalk and unless the jury believe from the evidence that the defect had existed for such a length of time that if defendant had exercised reasonable or ordinary care and diligence, it would or should have known of the defect in time to have repaired the same before the accident, by reason of which plaintiff sustained the injury here sued for, it being also the law, to be considered by the jury in connection with these instructions in this case, that where a corporation permits a lot owner to construct a sidewalk, it is the duty of such corporation to use ordinary care to see that it is constructed so as to be reasonably safe, and where a municipal corporation occupies and uses a sidewalk which has been constructed by such lot owner, it is the duty of such corporation to use ordinary care to determine whether it has been so constructed as to be reasonably safe for persons using it with ordinary care and prudence.[36]

Same—Bridge built by private individual.

(2062) The court instructs the jury that even if such bridge was in a public street, it must be conceded that it was built by private individuals and was maintained by private individuals, in connection with their mill, and that the city had refused to consider the bridge a public structure, and although built in the public street, if it was simply and solely an appendage to ——— and only useful as connected with

[35] Approved in Whitford v. Inhabitants of Southbridge, 119 Mass. 564.

[36] Village of Warren v. Wright, 103 Ill. 298.

the mill of ———, to the public only as dealing with ——— mills, and was not, during the time it has stood there and up to the time of the accident, useful to the public generally and used by them generally, in the course of ordinary travel along said street to and from places other than ——— mills, then the city would not be liable for the injuries suffered by the plaintiff through the falling of said bridge. But on the other hand, if said bridge stood in the public highway and appeared to be a part thereof, and the approaches from the traveled part of the street led directly thereto and it appeared to any one traveling along the highway to be a part of the street in ordinary use, and if it had been and was in actual use and utility generally to the traveling public and used by the general traveling public, then the city, if it had erected at or near the bridge no visible sign or monument warning the public that such bridge was not a part of the street, was under a duty so long as it permitted the bridge to remain in and as a part of the street, subject to general use and utility, to keep the same or see that the same was kept, in reasonable repair, so that it would be reasonably safe and convenient for public travel.[37]

Latent defects.

(2063) The court instructs the jury that a municipal corporation is not liable in damages for latent defects in a sidewalk (here define latent defects). To render the municipality liable, the defect must be of such a character that the municipal authorities by using ordinary care and diligence could discover it. If you shall find from the evidence in the case that the defect was of such a nature that the officials of the municipality could not have discovered it by using ordinary care and diligence, the defendant is not liable in damages and your verdict should be for the defendant.[38]

[37] Approved in Detwiler v. City of Lansing, 95 Mich. 484.

[38] Shaw v. President & Trustees of Village of Sun Prairie, 74 Wis. 105.

(2064) The court instructs the jury that if they believe from the evidence that the defect in the sidewalk alleged in the declaration to have caused plaintiff's injury was latent, and that the place of the accident was in a reasonably safe condition as far as discoverable by the exercise of reasonable care on the part of the city, and if the jury further believe from the evidence that the original construction of the place of the accident was proper they should find for the defendant.[39]

Care required with regard to streets undergoing improvements.

(2065) The court instructs the jury that it is for you to say whether, in making the improvement in this case, it was necessary to place the pile of rubbish complained of upon the streets, and whether it was necessary that it should remain there for a day or several days at a time. We refer to you to say whether or not, under all the circumstances, in view of all the testimony which was submitted in this case, there was such necessity.[40]

Defective bridges and approaches thereto.

(2066) The court instructs the jury that if you find the fact to be that when plaintiff's horse was being driven across the bridge on the day in question, the passage from the ——— to the approach was so steep that it was not reasonably safe,—whether the steepness was caused by the ——— or by the ——— as shown by the evidence,—but on account thereof the horse was overcome by the load, when he would not have been overcome if the incline had been more gradual, and shall also find that such incline might have been made easier, on the part of the city, by the exercise of reasonable care and skill, and that this steepness and condition caused the loss of the horse, then the city would be liable, provided the plaintiff and the driver were not guilty of want of ordinary care in the management of the horse and reason-

[39] Hearn v. City of Chicago, 20 Ill. App. 249.

[40] Approved in Frazier v. Butler Borough, 172 Pa. 407.

able time and opportunity to put the bridge in a safe condition occurred, as I have stated.[41]

(2067) The court instructs the jury that from the testimony they will determine whether the city authorities used that care and skill which a prudent man would ordinarily use in like circumstances in making and keeping the bridge as shown to have been on ———, 19—, with the surrounding facts; and if they find such care and prudence to have been taken and used in keeping said bridge in the dimensions shown, looking to all the circumstances,—that is, if they find that the bridge was reasonably safe and sufficient for the public,—then they will find for the defendant.[42]

(2068) The court instructs the jury that the board of commissioners of the defendant county are chargeable with knowledge of the tendency of timbers to decay and it is incumbent upon the commissioners to use ordinary care in providing against the timbers in a bridge becoming unsafe because of the decay incident to age and long use. They are not bound, however, to do more than use ordinary care and diligence; and if they act with ordinary care and diligence there is no liability.[43]

(2069) The court instructs the jury that the board of supervisors is charged by law with the duty of supervising and keeping the county bridges in repair. If the members of the board did not possess the requisite skill to discharge the duty of inspection, then it was the duty of the board to appoint or provide some one possessing such skill, and to have all county bridges under their care examined as frequently as men of ordinary prudence and care would deem necessary for the safety of the traveling public, and as experience dem-

[41] Approved in St. Clair Mineral Springs Co., Limited v. City of St. Clair, 96 Mich. 463.

[42] Approved in Keating Implement & Machine Co. v. Marshall Electric Light & Power Co., 74 Tex. 605.

[43] Approved in Apple v. Board of Commissioners of Marion County, 127 Ind. 555.

onstrated the necessity of examination, and if the board failed to do this, such failure would be negligence.[44]

Care required with regard to sidewalks.

(2070) The court instructs the jury that it is the duty of the corporation to keep the streets of the city in repair, and this includes the sidewalks for persons on foot, as well as the roadways, and it is no answer to a complaint for injury caused by a defect in the sidewalk, that there was a sufficient space thereon by which a safe passage might have been made, unless the injury might have been avoided by proper prudence on the part of the person injured, or unless negligence can be imputed to him as contributing to cause the injury.[45]

(2071) The court instructs the jury that any person using a sidewalk, in constant use by the public, has a right to presume, and act upon the presumption, that it is reasonably safe for ordinary travel throughout its entire width. In determining whether the city kept and maintained the sidewalk in a reasonably safe condition, you may properly consider its unobstructed width, if any, as well as the width or portion of the sidewalk occupied by the ———.[46]

Sidewalks in suburbs.

(2072) The court instructs the jury that it is as much the duty of the city to keep the sidewalks in the suburbs of the city in a safe condition for the use of travelers, as those in the heart of the city; that while the authorities may have a discretion in the matter of elegance of pavements, or in the matter of pavements or no pavements, yet they have no discretion in the matter of safety; and it is an absolute duty to keep all the sidewalks in the city in a reasonably safe condition for the use of travelers, whether in the body of the city or near its limits.[47]

[44] Approved in Ferguson v. Davis County, 57 Iowa, 611.

[45] Approved in City Council of Montgomery v. Wright, 72 Ala. 411.

[46] Approved in City of Indianapolis v. Gaston, 58 Ind. 224.

[47] Approved in City Council of Montgomery v. Wright, 72 Ala. 411.

Defective crossings.

(2073) The court instructs the jury that, if they find from the evidence that said crossing was not so reasonably safe for ordinary travel as aforesaid at the time of the alleged injury, to wit, on the night of the ——— day of ———, 19—, by reason of an opening between the stones in said crossing, erected for and used as stepping stones therein; and further find that the defendant had notice of such defect in such crossing or that the same had existed for a time prior to the time of said alleged injury, reasonably sufficient to have enabled the defendant to have ascertained the fact and remedied said defect, and further find that on the night of said day last aforesaid, the said plaintiff's wife, ———, while walking over said crossing, and while in the exercise of ordinary care and caution fell into said opening, and was thereby injured, and that her said fall and injury were caused by said alleged defect in said crossing, then they must find for said plaintiff.[48]

Excavations and holes in streets.

(2074) The court instructs the jury that, under the law the city of ———, defendant herein, is charged with the duty of maintaining its streets and alleys in a reasonably safe condition, so that those having occasion to use them may do so in safety. It was the duty of defendant to keep ——— street in a reasonably safe condition at the point covered by the hole in question, by providing a reasonably safe and sufficient covering for said hole and by keeping the said hole covered. If the defendant failed to provide a covering for said hole reasonably safe and sufficient, in consequence of which the covering fell into the hole leaving the same uncovered and unprotected, then such an act on the part of the city was negligence. (Or if the defendant suffered said hole to remain without covering after knowing the same was open

[48] Approved in Davenport v. City of Hannibal, 108 Mo. 471.

or when by the exercise of ordinary care the defendant might have known that said hole was open, then such act of the defendant was negligence.) And if you shall believe from all the evidence in this case that the plaintiff while in the exercise of ordinary care fell into the hole on ——— street, while attempting to cross said street, by reason of the negligence of the defendant as in this instruction defined, and that by reason of such fall plaintiff sustained the injuries complained of, then your finding must be for the plaintiff.[49]

(2075) The court instructs the jury that it was the duty of defendant, the city of ———, to keep its alleys reasonably safe for passage and travel thereon; and if they believe from the evidence that the excavation mentioned in plaintiff's petition was made by defendant K. under authority of and by permission of the city of ———, and was made in the alley in the petition mentioned and that the same was through the negligence and carelessness of defendants or their servants or agents permitted to remain open and unprotected or insufficiently guarded, and that plaintiff in passing along said alley on the night of ———, without any fault or negligence on his part, fell and was precipitated into said excavation and was injured thereby, they will find for plaintiff against both defendants.[50]

Openings into sewers and drains.

(2076) The court instructs the jury that if the (drain) was a reasonably proper one in its manner of construction, and the leaving it uncovered and unfenced between the crossings of the streets and alleys was not reasonably liable to result in injury to persons passing and using ordinary care to be expected from those who usually travel streets in the city, the defendant would not be liable and you should return your verdict for the defendant.[51]

[49] Approved in Barr v. City of Kansas, 105 Mo. 550.

[50] Approved in Britton v. City of St. Louis, 120 Mo. 437.

[51] Approved in City of Galveston v. Posnainsky, 62 Tex. 118.

(2077) The court instructs the jury that it is the duty of the defendant to provide for the health of the inhabitants of the city by the construction of all necessary and proper drains. It is a question for the jury to determine from the proof whether the (drain) on ——— street; covered at the crossings of the streets and alleys, but left uncovered in the intervening spaces and without any barrier to prevent travelers falling in the same, was such a construction as that the persons using such street could with reasonable care avoid receiving injury therefrom.[52]

Necessity of barriers.

(2078) The court instructs the jury that if they believe from the evidence that plaintiff while passing along the street at the place alleged in the declaration and while lawfully on such street passed off from the street at a point near to a dangerous place and that the dangerous place was of such a character that in order to protect travelers and make it safe some railing or barrier was reasonably requisite at such point and such railing or barrier was totally wanting, then the jury will find for the plaintiff if they further believe from the evidence that plaintiff was in the exercise of due care and that plaintiff received injuries here sued for because of such dangerous place.[53]

(2079) The court instructs the jury that it was the duty of defendant, in erecting and constructing the bridge in question, over and across a public street in a city, to so erect and construct said bridge as to make the same reasonably safe for travel and use, for all persons over the same on foot or otherwise, as well in the night as in the daytime; and, if the jury believe from the evidence that a railing or other guard was necessary on the sides of the bridge, to protect foot passengers by day or by night from the danger of a fall from the bridge, then it was the duty of defendant to cause to be pro-

[52] Approved in City of Galveston v. Posnainsky, 62 Tex. 122.
[53] Alger v. City of Lowell, 85 Allen (Mass.) 402.

vided and constructed on the side of the bridge such railing or other sufficient guard, to give protections against such danger of fall from the bridge; and the court instructs the jury, that the question whether such railing, or other guard, was necessary, is not a question for the court to decide, but a question for the sole finding and determination of the jury; and unless the jury find from the evidence that such railing or guard was so necessary for the reasonable safety of persons passing over the bridge, and that defendant failed to provide the same, plaintiff is not entitled to recover in this action. But if the jury find from the evidence that such railing or guard on the sides of the bridge was necessary for the reasonable safety of passengers, by night or by day, and that defendant failed and neglected to provide the same; and further find that plaintiff, on the night of the ———, was passing along a public street of said city, leading to or over said bridge, observing and using ordinary and reasonable care to pass and go over said bridge safely, when, through the fault and negligence of defendant in failing to have such railing or other guard along the side of said bridge, he stepped or fell from said bridge into the ——— below, and was thus hurt and injured,—in such a case the jury will find for plaintiff (the amount sued for).[54]

Overhanging signs.

(2080) The court instructs the jury that it is the duty of the city of ——— to use ordinary care to prevent the construction or maintenance of signs which overhang the sidewalks, unless the same are constructed and suspended with ordinary care and skill considering the dangers of such structures to the public who travel thereunder upon the sidewalks. A failure of the city to exercise this degree of diligence and care would be such negligence as would make it liable for damages which might result therefrom.[55]

[54] Approved in Loewer v. Sedalia, 77 Mo. 431, 442, 443.

[55] Approved in Gray v. City of Emporia, 43 Kan. 704.

Liability of city for injuries caused by objects dropped from platform.

(2081) The court instructs the jury that the plaintiff in this case was injured by the dropping of a bale of hay from a platform which one R., an abutting owner, had built from the second story of his building over the street. R. had a right to back wagons up to his building for the purpose of loading and unloading them, provided he did not obstruct the travel for an unreasonable length of time, and did nothing to unreasonably endanger passers-by. The platform itself was neither a nuisance nor an obstruction and defendant city had the right to suppose that the use of the platform would not be such as to make it a nuisance. If the jury believe from the evidence that the city did not have actual notice of any improper use by R. of the platform, and that no notice is to be imputed to the city of any such improper use, then the jury cannot find the defendant liable for the act of R. in throwing the bale of hay from said platform down into the street.[56]

Insufficient light.

(2082) The court instructs the jury that if they believe from the evidence that plaintiff was injured by reason of defects in a sidewalk as alleged in the declaration and that plaintiff was in the exercise of due care at the time of the accident and that the defendant had not provided sufficient light at the place of the accident to enable the plaintiff to see the sidewalk, the jury may find a verdict against the defendant.[57]

Ice and snow on sidewalks.

(2083) The court instructs the jury that if they find from the evidence that the walk was in an extraordinary condition of slipperiness in view of the season of the year, and you find that it was not so constructed as to be reasonably

[56] Parmenter v. City of Marion, 113 Iowa, 297.

[57] Approved in City of Sumner v. Scaggs, 52 Ill. App. 551.

safe after extraordinary storms and freezing weather, such as are liable to occur at the season of the year when the accident happened, you will be warranted in finding the walk defective. The rule of the statute and of reasonable safety requires that all walks shall be reasonably safe for those walking on them with ordinary care in an ordinary condition of weather, or during such ordinary changes of weather as are liable to occur at any season of the year, and at the season of the year when the accident occurred. The question as to whether the sidewalk was defective is one of fact for you to determine.[58]

(2084) The court instructs the jury that as a general rule the mere fact that snow or sleet had fallen upon the sidewalk from the clouds and thereby rendered the sidewalk slippery and difficult to pass over, would not make the city liable therefor, even though such ice and snow should remain upon the walk for an unreasonable length of time after the officers of the city, whose duties required them to look after such matters, had notice of its existence, or after they, in the exercise of reasonable care in performing their duties, ought to have known of its existence; but this rule relates only to the natural conditions resulting from rain or sleet falling and freezing upon the walk, or snow accumulating upon the walk from natural causes. Where, after such ice or snow has thus accumulated, and if by reason of persons traveling over the same, or if from other causes, as from ice or snow thawing and flowing down upon the walk from other lands, the surface of the snow or ice upon the walk becomes rough or ridged, or rounded in form, or lies at an angle or slanting to the plain surface of the walk, so that it becomes difficult and dangerous for persons traveling on foot to pass over same, when exercising ordinary care, or if the walk is constructed in such manner as not to permit the natural flow of the water and thawing snow from lands adjoining, but dams

[58] Hill v. City of Fond du Lac, 56 Wis. 242.

same upon the walk and holds same there until it freezes, and the walk becomes dangerous by reason thereof, to persons using ordinary care in attempting to pass over same, or by reason of snow or ice having accumulated on the walk from natural causes, and flowing water and snow from adjoining lands are dammed up and held upon the walk, and frozen there, and by reason thereof making the walk dangerous for persons using ordinary care in passing over the same on foot, then the city becomes liable for injuries caused by such obstruction, provided the person injured did not contribute to his injury by negligence on his part and the obstruction has existed for an unreasonable length of time after the same became known to the city authorities, or ought to have been known to them in the exercise of reasonable care.[59]

(2085) The court instructs the jury that if the sidewalk in question was constructed in a proper manner, sufficiently level and smooth for ordinary travel, without obstructions, and so built that it would not, by reason of any peculiarities of its construction, cause snow or ice to accumulate thereon, and if there was no accumulation of snow or ice thereon, and the accident was attributable solely to the slippery condition of that part of the sidewalk, occasioned by a recent fall of snow, and that the sole cause of the accident was the temporary slipperiness of that part of the sidewalk caused by the recent fall of snow thereon, and that, in the absence of snow or ice, that part of the sidewalk, in its ordinary condition, was not unreasonably unsafe, such condition of the sidewalk would not be a defect for which the city would be liable.[60]

Condition of street before or after injury.

(2086) The court instructs the jury that the question as to whether or not the street and sidewalk at the place men-

[59] Approved in Huston v. City of Council Bluffs (Iowa) 69 N. W. 1130.

[60] Approved in City of Chicago v. McGiven, 78 Ill. 347.

tioned and described in the declaration in this case, was in a reasonably safe condition for the purpose of persons lawfully passing and repassing over and along the same, both by day and night, must be determined from the condition said sidewalk was in at the time the alleged injury complained of by the plaintiff was received by him, and not from its condition before or after that time.[61]

(2087) The court instructs the jury that the condition of the ——— prior to the injury cannot be considered by you in determining whether or not the city has been negligent, if you should find the ——— complained of as dangerous, was on the evening of the alleged injury, barricaded or protected so as to be reasonably safe to persons walking on the sidewalk, there in the exercise of due care, or such care as an ordinarily prudent man would exercise, taking into consideration the kind of night it was.[62]

Effect of defects other than one causing injury.

(2088) The court instructs the jury that, the evidence of the existence of loose boards other than the one upon which the plaintiff tripped, is not competent for your consideration for any purpose except as it may tend to show the want of the exercise of due care on the part of the defendant, which would have led to the discovery on its part, of the fact that the board upon which the plaintiff tripped was loose at the time of the injury.[63]

Notice.

(2089) The court instructs the jury that if they believe from the evidence that a defect existed in the sidewalk at the place alleged in the declaration, at the place where the plaintiff received the injuries for which he here sues, and that such defects were apparent to a person examining the walk with

[61] Approved in Foley v. City of Huntington, 51 W. Va. 396.
[62] Approved in Cramer v. City of Burlington, 42 Iowa, 315.
[63] Approved in Kansas City v. Bradbury, 45 Kan. 381.

ordinary care, and that such defects did exist at the time when S., the officer of defendant, examined the walk, then the defendant must be deemed to have had actual notice of the defect; the question then will be, what was the condition of the walk at the time that S. examined it?[64]

(2090) The court instructs the jury that if the injury here sued for resulted from the condition of the street produced by the recent and sudden action of the elements, defendant is not chargeable, unless under all the circumstances the defendant ought to have repaired the defect before the accident happened, and had a reasonable opportunity to so repair the defect, and if the defendant could have had no such notice and reasonable opportunity as would have enabled the defendant to repair, the defect is not one for which the defendant is liable.[65]

(2091) The court instructs the jury that actual notice would of course be sufficient, but it is not necessary in all cases. It may be inferred from the notoriety of the defect or damage and from its continuation for such length of time as to lead to the presumption that the proper officers did in fact know, or with proper diligence and care might have known the same.[66]

(2092) The court instructs the jury that, before the plaintiff can recover a judgment in this action, it must appear by a preponderance of the evidence: First, that the plaintiff, ———, was injured as the result of a defect in the sidewalk on the said ——— street, in the defendant city, as set out in her petition. Second, that said city or its officers were negligent in permitting said sidewalk to remain in said unsafe condition at the time said plaintiff was injured. To charge the defendant with negligence it must appear that the proper officers of said city had notice of the unsafe con-

[64] Fee v. Columbus Borough, 168 Pa. 382.
[65] Hubbard v. City of Concord, 35 N. H. 52.
[66] Approved in Rosenberg v. City of Des Moines, 41 Iowa, 415.

dition of said sidewalk in time to have prevented injury to said plaintiff by falling on said defective sidewalk (if you find she was so injured), or that by the exercise of reasonable or ordinary care and diligence they could have known of the unsafe condition of the sidewalk.[67]

(2093) The court instructs the jury that if they believe from the evidence that the defendant failed to keep the sidewalk at the place of the alleged accident in a reasonably safe condition and that by reason of negligence in this respect plaintiff received his injury as alleged in the declaration, defendant will be liable.[68]

(2094) The court instructs the jury that there is evidence that one of the officers of defendant, Mr. ———, was accustomed to walk over the walk about every day. That you may consider in respect to the question of actual notice of the defects in the walk. He testifies that he did not discover any such defects as described by the plaintiff and he thinks he would have discovered them if there had been any there. All this is for you. You must determine from this conflicting testimony what the true facts are. What was the actual condition of this sidewalk at the time that the accident occurred, and how long had it existed prior to that time? If it was actually known by the officers that the sidewalk was dangerous, and for an unreasonable time they neglected to repair it, or, if it had been dangerous so long that, considering its situation, the amount of travel over the walk and the public place the walk occupied, and all the circumstances in the case, the officers by exercising reasonable and ordinary care should have known of it and failed to repair it, then they were negligent.[69]

[67] Approved in Kansas City v. Bradbury, 45 Kan. 381.

[68] City of Chicago v. Stearns, 105 Ill. 554.

The above instruction is not erroneous on the ground that it does not expressly require that there should have been either actual or constructive notice to the city.

[69] Approved in Fee v. Columbus Borough, 168 Pa. 382.

(2095) The court instructs the jury that if they believe from the evidence, that the sidewalk in which the defect is alleged to have been, and where the plaintiff is alleged to have been injured, was properly and safely constructed, and laid down, and that prior, and up to, or about the time of the alleged injury, it appeared to be in a proper and safe condition, then, if there be no evidence that the defendant had actual knowledge of such defect, or that the defect existed for such length of time before the injury, that the defendant, if exercising proper care and diligence, would have known of it, the jury should find the defendant not guilty. Notwithstanding the jury may believe, from the evidence, that the said sidewalk, at the time of the alleged injury, was defective, yet this fact alone would not be sufficient evidence of negligence on the part of the defendant.[70]

Notice of unlawful obstruction of highway.

(2096) The court instructs the jury that if the ——— was left unlawfully there (in the highway) the town must have had notice that it was unlawfully there; that is, the town must have had notice that the parties charged with the transportation of it had left it without necessity within the traveled part of the highway, or that part of the highway wrought and prepared for public travel. It would not be sufficient merely to show notice to the town that it was there. But the illegal element must be brought home to the knowledge of the town. It must be shown that the town had knowledge that it was left there without necessity. Because, until they had such knowledge, neither the highway surveyor nor any of the town officers would have a right to interfere with it.

Constructive notice.

(2097) The court instructs the jury that actual notice need not be shown in all cases. It may be inferred from

[70] Approved in City of Chicago v. McCarthy, 75 Ill. 602.

the notoriety of the defect or from its being so visible and apparent and having continued for such length of time, as that, in the exercise of reasonable observation and care, the proper officers of the city ought to have known of and remedied or removed the defect or obstruction. The evidence in this case fails to show actual notice of the defect or obstruction complained of, if same existed, to the defendant or its officers, but if the evidence shows that such defect or obstruction had existed for such length of time, was so visible and apparent, as that the officers and servants of the defendant ought, in the exercise of ordinary care and observation to have known of and remedied or removed same before the time of the accident in question, this would be sufficient to show that the defendant was negligent in permitting such defects or obstructions to remain at the time of the accident; but unless the evidence does show that said defects or obstructions were caused by the negligence of the defendant in constructing the ——— at the place in question, as before explained, or that same was of such notoriety or had existed for such a length of time and were visible and apparent before the accident, as that the officers and servants of the defendant, in the exercise of ordinary care and observation, ought to have known of and remedied or removed said defects or obstructions, the defendant cannot be charged with negligence on account thereof and the plaintiff cannot recover in this case.[71]

(2098) The court instructs the jury that if the sidewalk was properly constructed, and afterward became out of repair, then defendant would not be liable unless you find it had notice of such defect. But actual notice need not be proved in all cases. It may be inferred from the notoriety of the defect or danger, from its continuance for such a length of time as to lead to the presumption that the proper

[71] Approved in Hazard v. City of Council Bluffs, 87 Iowa, 51.

officers did in fact know, or with proper diligence might have known.[72]

(2099) The court instructs the jury that it is not necessary that the defendant city should have had actual notice of the unsafe and dangerous condition of the sidewalk (if you find that the sidewalk was unsafe). If you find that said condition of said sidewalk existed a sufficient length of time before the injury to plaintiff to have enabled the defendant city, or its officers and agents, by the exercise of ordinary care and diligence to have known of the existence thereof, and remedied the same, then the law implies a notice to the defendant city of the existence of the condition.[73]

(2100) The court instructs the jury that before the plaintiff can recover, he must show to the jury by a preponderance of the evidence that the defendant after receiving actual or constructive notice of the hole in the walk which is alleged to have caused the injuries here sued for had a sufficient time to repair the said hole and neglected to make such repairs. If there was a hole in the sidewalk as alleged by the plaintiff which rendered the sidewalk out of reasonable repair so that the sidewalk was not in a reasonably safe condition and fit for public travel for a long time prior to the injury here sued for and alleged to have been caused by the hole, say for one month to six months prior to the injury and the said hole was open and notorious and of such a character as would naturally arrest the attention of the persons traveling over the walk, then the defendant will be presumed to have had notice of the said hole and the unsafe condition of the said walk caused by the hole.[74]

(2101) The court instructs the jury that, in the absence

[72] Approved in Rice v. City of Des Moines, 40 Iowa, 638.

[73] Approved in Kansas City v. Bradbury, 45 Kan. 381.

[74] Approved in Mulliken v. City of Corunna, 110 Mich. 212.

The above instruction was criticised on the ground that it did not leave to the jury to determine what was reasonable notice to the city.

of express notice to the defendant city or its officers, of the defects which caused the injury sustained by plaintiff, the plaintiff cannot recover unless it is shown from the evidence that the time the sidewalk was out of repair (if you find from the evidence that it was out of repair), was so long that the said ——— should have known of it and reported it before the accident, or that the officers of the city were guilty of negligence, in not knowing of it and reporting it before the accident.[75]

(2102) The court instructs the jury that if the jury shall find, from the evidence, that the ——— spoken of by the witnesses was in an unsafe and insecure condition at the time of the alleged ———, and that the same had been in such condition for three months, or any considerable period prior to that time, this is evidence from which the jury may infer negligence on the part of the defendant. And if the jury shall also find, from the evidence, that the said ——— was erected by the defendant for municipal purposes, then it was the duty of the defendant to keep the same in repair. And if the jury shall find that the defendant has been guilty of such negligence in keeping the same in repair, then the plaintiff is entitled to recover, although the jury shall find that no express notice was given to the city of the unsafe condition of the ———, if they shall also find that the plaintiff was injured by reason of the insecure condition of the said ——— without any negligence on his part.[76]

Same—Overhanging sign.

(2103) The court instructs the jury that, if you believe from the evidence that the sign in question was in a dangerous and unsafe condition at the time of and previous to the injury complained of, and had been in such condition several months prior thereto, and that such dangerous condi-

[75] Approved in Kansas City v. Bradbury, 45 Kan. 381.

[76] Approved in City of Chicago v. Major, 18 Ill. 349.

tion was such as would be apparent upon an ordinary examination and inspection thereof, then it was the duty of the city to have known of such condition and it is chargeable with negligence in permitting it to remain where it was, in such unsafe condition, the same as if the city or its officers had actual knowledge of such condition.[77]

Negligence of traveler.

(2104) The court instructs the jury that any person traveling upon a street which is in constant use, and who exercises due diligence and care and is not aware of any defects in the street, has a right to presume and act upon the presumption that the street is reasonably safe for ordinary travel.[78]

(2105) The court instructs the jury that the plaintiff had the right to assume that the defendant would perform its duty in keeping the sidewalk in the declaration mentioned in safe and proper condition, and he was required to exercise only ordinary care in passing over the place where the accident occurred, unless he knew of its dangerous condition, or might have seen it by the exercise of the care ordinarily observed by the citizens in walking along the sidewalks of the city; he was not required to anticipate danger, nor to be on the lookout for its existence.[79]

(2106) The court instructs the jury that if plaintiff by his own negligence, approximately contributed to his own injury, then the defendant is not liable in this suit. In determining the question of negligence on the part of the plaintiff, it will be proper for the jury to take into consideration the hour of the night the injury was received, the business calling plaintiff to ———, and darkness of the night and all the facts and circumstances connected with his visiting such

[77] Approved in Gray v. City of Emporia, 43 Kan. 704.
[78] City of Chicago v. Morse, 33 Ill. App. 61.
[79] Gordon v. City of Richmond, 83 Va. 436.

——— and whether or not the plaintiff was under the influence of intoxicating liquor.[80]

(2107) The court instructs the jury that a traveler on a public street is held to the exercise of only ordinary care. Slight negligence, which is a want of extraordinary care, will not defeat a recovery for an injury received in consequence of a defect in a public street or highway, provided the evidence shows that the city authorities were guilty of negligence in permitting the defect to exist, and that the traveler was injured thereby, and was using ordinary care to avoid the injury.[81]

(2108) The court instructs the jury that if the proof should satisfy you that the ——— was one dangerous to persons passing and using ordinary care, but should satisfy you also that the injury in question resulted from the want of ordinary care on behalf of the plaintiff, the plaintiff cannot recover for the injury thus received through plaintiff's want of ordinary care. In considering the question of the use of care on the part of the plaintiff, you will have regard to the age of the plaintiff and not exact the same degree of care on the part of a child of 9 or 10 years as would be exacted of and exercised by a person of mature years and discretion.[82]

(2109) The court instructs the jury that the law requires of one riding in the daytime such attention to the road over which he is about to pass, as to see large holes that are conspicuous and obvious and in plain sight, unless some good and sufficient reason excuses the inattention.[83]

(2110) The court instructs the jury that if the plaintiffs, in the sunlight, and at a walk, upon a broad and substantially level road, with ample width for passing by the hole, alleged to have caused the injury here sued for, fell into

[80] Approved in Cramer v. City of Burlington, 39 Iowa, 512.
[81] Approved in Moore v. City of Richmond, 85 Va. 538.
[82] Approved in City of Galveston v. Posnainsky, 62 Tex. 122.
[83] Approved in Hill v. Inhabitants of Seekonk, 119 Mass. 85.

such hole, and the hole was conspicuous and obvious and in plain sight, they were not in the exercise of due care, or that care required of people driving on a road, unless they show some excuse for their inattention to their track.[84]

(2111) The court instructs the jury that the attempt of a visitor to a friend in the city to walk home at night, on a sidewalk which has been left in bad repair by the city, and which is in the same condition in which it has been kept for months, and which is the only one in the city used by all persons having occasion to go in that direction, is not negligence in him; and if a person so walking is injured, by reason of a defect in the sidewalk, he is entitled to recover damages, unless his negligence in walking contributed to the injury.[85]

(2112) The court instructs the jury that there is evidence that the plaintiff had passed over the walk frequently. He did not testify as I remember that he had observed or noticed the dangerous condition of the walk, these loose planks and so on, before the accident alleged to have caused the injuries here sued for; but whether he had noticed it—whether he ought to have noticed it—is for you. He was not bound to the exercise of extraordinary care; but he was bound to use such care as a person of ordinary prudence, situated as he was, under like circumstances, would use and if he neglected to use such care, then it would be negligence.[86]

Same—Circumstances increasing degree of care to be exercised.

(2113) The court instructs the jury that greater care and caution is required of aged and infirm persons in walking along and over the public streets and highways than of the young and able bodied, and greater care and caution is required of one passing along said streets and highways in the nighttime than in the daytime, and the presence of snow

[84] Approved in Hill v. Inhabitants of Seekonk, 119 Mass. 85.
[85] Approved in City Council of Montgomery v. Wright, 72 Ala. 411.
[86] Approved in Fee v. Columbus Borough, 168 Pa. 382.

upon the ground and upon the sidewalk is a fact in itself which calls for the exercise of greater care on the part of the traveler.[87]

(2114) The court instructs the jury that it was the duty of the plaintiff to exercise ordinary care and diligence in traveling along the sidewalk to avoid accidents, and this care and diligence increases or diminishes with the circumstances of the case; for instance if the night was dark when traveling on the sidewalk, it would be a duty to exercise more care and caution than in open day; and if you find from the evidence that plaintiff did not exercise care and caution commensurate with the surrounding circumstances, and such want of care materially contributed to the injury, then the plaintiff cannot recover.[88]

(2115) The court instructs the jury that in determining whether the plaintiff was guilty of a want of care in going upon the sidewalk, you will take into consideration the defective condition of the walk at and prior to the time of the injury, as alleged by her in her petition and which allegation binds her on this branch of the case; her condition, including her pregnancy and her agility or feebleness owing to said condition or other cause and her knowledge or want of knowledge of the walk; and all the circumstances of the case, as established by the evidence; and if you believe, considering the knowledge that the plaintiff had of the walk, if any, her ability to walk upon this kind of a walk at the time and the necessities of the cause, that is the need of her going upon the walk, that she could without unreasonable precaution have taken another way and thus avoided exposing herself to the danger of walking upon this walk in the condition it is alleged to have been in at the time, and that a reasonably prudent person in the exercise of ordinary care and caution would not in her condition have attempted with her knowl-

[87] Approved in Foley v. City of Huntington, 51 W. Va. 396.
[88] Approved in Kansas City v. Bradbury, 45 Kan. 381.

edge of the walk, if any, to have gone upon the walk, then she is not entitled to recover.[89]

(2116) The court instructs the jury that plaintiff was upon his part held to the exercise of ordinary care and whether plaintiff was in the exercise of ordinary care depends upon circumstances, such as whether the plaintiff was traveling in the daytime or at night, the place where the accident happened, the construction and width of the sidewalk and all the other circumstances in evidence surrounding the transaction.[90]

(2117) The court instructs the jury that if the jury find, etc., that the place where the accident occurred was necessarily more dangerous than the ordinary streets and sidewalks, then the plaintiff was required to use more than ordinary care and diligence to avoid accident, and if in such case she failed to use such care and diligence in proportion to the danger, she cannot recover.[91]

Same—Duty of traveler to take safer way.

(2118) The court instructs the jury that if they believe from the evidence that plaintiff had frequently used and passed over the place of the alleged accident before the injury and that the danger of traveling over the place of the accident was apparent, and that by exercising great care, plaintiff would still have been liable to injury in taking the route that she did and if the jury further believe from the evidence that there was another way reasonably safe which plaintiff might have taken, they may find plaintiff guilty of contributory negligence.[92]

(2119) The court instructs the jury that, if you find from the evidence that the plaintiff drove up to the ditch on ——— street and that he saw, or could by the exercise of or-

[89] Approved in Munger v. Waterloo, 83 Iowa, 559.
[90] Hall v. Incorporated Town of Manson, Iowa, 90 Iowa, 585.
[91] Approved in City of Joliet v. Verley, 35 Ill. 58.
[92] City of Bunker Hill v. Pearson, 46 Ill. App. 47.

dinary care and prudence have seen the same, and that he could then have turned back and proceeded upon another route, or that he could have driven safely directly across the ditch, and instead of turning back or driving directly across, he turned to the right and attempted to cross in a diagonal course and his vehicle was upset by falling into the ditch and he was disabled, then before you can find for plaintiff you must find from the evidence that he acted with ordinary prudence and care and that he was guilty of no contributory negligence.[93]

(2120) The court instructs the jury that if they believe from the evidence that the most direct route for the plaintiff in going to and from his home to his place of business was over ——— in the said city of ———, then the fact (if shown by the evidence) that the sidewalk on said street over which the plaintiff passed, was defective, and had been in a defective condition for some years previous to the alleged injury sustained by plaintiff because of the defect, would not oblige the plaintiff to take another route, or a sidewalk which was less convenient.[94]

Same—Knowledge by traveler of defects.

(2121) The court instructs the jury that if the plaintiff knew that defendant or others were making or had made an excavation where the injury was received, then the law would require more care on his part to avoid injury than if he knew nothing about it. When a person knows of an excavation, the law requires of him to exercise such reasonable care as an ordinarily prudent and cautious person would use under like circumstances; and, if this is done and injury results, the person is without fault.[95]

(2122) The court instructs the jury that the plaintiff must satisfy the jury that he was in the exercise of due care

[93] Approved in City of Austin v. Ritz, 72 Tex. 391.
[94] City of Aurora v. Hillman, 90 Ill. 61.
[95] Approved in Town of Elkhart v. Ritter, 66 Ind. 136.

at the time of the alleged injury; and if a want of due care on his part contributed in any degree to the injury, he cannot recover, though it would not have occurred except for the omission of the town to perform its duty. A knowledge of the condition of the way and its alleged defects would not be conclusive that the plaintiff did not exercise due care; but where a person has knowledge of the defects, or reason to apprehend any danger, a much greater degree of care and circumspection is properly required of such person; and if, with his knowledge, the plaintiff did not exercise due care and prudence, either in entering upon the way, or in proceeding thereon after he had entered, he cannot recover. And whether with his knowledge, and under all the circumstances, the plaintiff is in the exercise of due care, is a question for the jury to determine.[96]

(2123) The court instructs the jury that if the plaintiff knew of the defect in the sidewalk alleged to have caused the injury sued for in this case, he was entitled to recover only in case the jury find from the evidence that he was passing along the walk carefully and thoughtfully with intent to avoid the danger which he knew was in the way, and if the jury believe from the evidence that plaintiff knowing of the alleged defect in the walk, was passing thereon carelessly, recklessly and without thought of such defect or caution to avoid it and safely pass over it, then the jury must find for the defendant.[97]

Same—Burden of proof.

(2124) The court instructs the jury that before the plaintiff can recover in this case, she is bound to prove affirmatively, not only that the defendant was guilty of negligence, but she must affirmatively prove that she was using at the time of the accident all the care and diligence that a reason-

[96] Approved in Whitford v. Inhabitants of Southbridge, 119 Mass. 564.

[97] Cuthbert v. City of Appleton, 24 Wis. 383.

able person would ordinarily use in passing a place of that description. In this case the burden of proof is not upon the defendant to prove want of care in passing, but upon the plaintiff to prove that she did pass with such caution.[98]

Injuries to children.

(2125) The court instructs the jury that if they believe from the evidence that the plaintiff was a child four years of age, and that his parents were financially unable to employ nurses or attendants of the child, and that in the pursuit of their daily occupation they were unable to keep a constant and vigilant eye through every moment of the day upon plaintiff, the fact that the plaintiff was allowed to go unattended into the street for a short time, would not prevent the jury from finding the city liable though the obstacle in the street which caused plaintiff's injuries would not have injured a mature person making use of the streets.[99]

(2126) The court instructs the jury that before they can find a verdict against the defendant, they must believe from the evidence that the defendant did not exercise reasonable care with reference to the condition of the street at the place where the plaintiff was injured; that such defective condition of the street produced the injury sued for, and they must further believe from the evidence that the parents of the plaintiff were not guilty of negligence in allowing the plaintiff to go unattended upon the streets and that the burden of proof rested upon the plaintiff to show that the parents were not negligent.[100]

Recovery over.

(2127) The court instructs the jury that while the municipal corporation, by reason of its exclusive power over the streets and alleys within its corporate limits, must be held

[98] Approved in City of Joliet v. Verley, 35 Ill. 58.
[99] City of Chicago v. Major, 18 Ill. 349.
[100] City of Chicago v. Major, 18 Ill. 349.

to a strict and rigid performance of the duty, necessarily resulting from such exclusive power, to keep such street and alleys in a safe condition for the ordinary use thereof by the public, and will be liable in damages for injuries resulting from its neglect to perform such duty; yet, where it appears in such a case, that the unsafe condition of the street or alley has been brought about by the wrongful act or omission of a third party, the municipal corporation shall have its remedy against such third party for the repayment of the damages it has sustained.[101]

III. Liability with Respect to Drains and Sewers.

Liability for flooding of premises caused by defective drains and sewers.

(2128) The court instructs the jury that if they believe, from the evidence, that the city of ——— fixed the grade in M. street in said city and constructed the street and caused to be constructed sewers and drains on said street to carry off the surplus water which necessarily, in case of rains, would run down said street, by reason of said grading; and that, in ———, 19—, there came a rain, and said sewers or drains were stopped up, or were otherwise defective, so that they would not carry off the surplus water, and thereby the water from said rain was forced into the basement of the plaintiffs' building, and the plaintiffs thereby damaged, then the jury should find for the plaintiffs to the amount which the proof shows such damage to be.[102]

(2129) The court instructs the jury that while it is the duty of the city, in the construction of water ways, to take into consideration, not only the ordinary and usual quantity of water in ordinary times, but also the liability to freshets occasionally occurring, still, if they should so provide, and an unusual and extraordinary storm should occur whereby

101 Approved in Town of Centerville v. Woods, 57 Ind. 192.
102 Approved in City of Aurora v. Gillett, 56 Ill. 132.

the whole immediate country around should be overflowed and flooded, and which, by the exercise of ordinary prudence, could not be provided for and guarded against, and the damage occurred by reason of such disastrous storm, the city will not be liable, the law only holding the city to the exercise of ordinary care and prudence.[103]

(2130) The court instructs the jury that it may be stated as a general principle, that when the situation of two adjoining fields, lots or pieces, is such that the water falling or collected by melting snows upon one naturally descends upon the other, it must be suffered by the lower one to be discharged upon his lands, if desired by the owner of the upper field; but the latter cannot, by artificial trenches or otherwise, cause the natural mode of its being discharged to be changed to the injury of the lower field or lot, as by conducting it by new channels in unusual quantities on to particular parts of the lower field or lot; therefore, if the jury believe, from the evidence, that the water which flowed into the basement of the building, and occupied by plaintiffs in ———, 19—, would have flowed upon the lot covered by the building, in a state of nature, then it still had a right to flow over the same, and the jury should find for the defendant. But if the jury also believe, from the evidence, that the natural flow of the said water across M. street was interfered with by the grading of M. street, and that the water was sought to be conducted by the city by drains and sewers down M. street to F. river, and that, by reason of such interference and of insufficient sewers and drains, or by allowing the sewers to fill up, conducted the water by new channels in unusual quantities into the basement of said building, then the city is liable to the plaintiffs in this suit.[104]

[103] Approved in German Theological School v. City of Dubuque, 64 Iowa, 739.

[104] Approved in City of Aurora v. Gillett, 56 Ill. 132.

Diversion of surface water by change of grade.

(2131) The court instructs the jury that if said embankment was raised above the established grade of the street, it was an obstruction for which the defendant is responsible, though it did not directly create or make the obstruction or authorize it to be done, and if said embankment was and is an obstruction to the natural flow of the water upon and across said street, and causes the water to dam up and flow back upon the adjacent premises to the injury of the owner, the defendant is liable, if at the time of the injury the premises were as high as the grade of the street, and if defendant in grading and working its streets obstructs the natural flow of surface water, and by reason of its failure to provide necessary channels for carrying off the water, it is caused to flow in increased quantities upon the adjacent premises to the injury of the owner, for such injury the defendant is liable if no fault of the owner contributed thereto.[105]

(2132) The court instructs the jury that the city, as a public corporation, has a right to establish grades for streets, and to fill up the streets to correspond with the grade established, and if the work is done in a careful and skillful manner, the city will not be liable for injuries to property, which are the necessary result of the careful and skillful grading of the streets. On the other hand, if the city, in grading the streets, did the work in an unskillful and improper manner, by making improper or insufficient gutters, by reason of which the water was caused to flow from the street upon the premises of plaintiff, he will be entitled to recover, if you find the injuries complained of resulted from such alleged unskillful construction of the street.[106]

IV. Enforcement of Claims Against Municipalities.

Conditions precedent—Presentation of claim to council.

(2133) The court instructs the jury that it is provided in

[105] Approved in Damour v. Lyons City, 44 Iowa, 276.
[106] Approved in Ellis v. Iowa City, 29 Iowa, 230.

substance by the charter of the city of ———, that all claims against the city shall be audited and allowed by the common council and that a statement of the claim shall be made by the claimant, and filed with the common council and verified by the oath of the claimant before the claim is allowed, and that it shall be a conclusive answer to any suit, brought by the party to enforce such a claim, that it had not been presented to the council. In my judgment, gentlemen of the jury, that provision of the charter is applicable to this case. It is conceded by the plaintiff that, before commencing this suit, he did not present any claim to the common council for a return or payment back to him of this tax as provided by the charter and consequently for this reason it becomes my duty as I view the law, to instruct you that the plaintiff cannot recover in this action, and that your verdict should be for the defendant.[107]

Sufficiency of notice to city of intention to sue.

(2134) The court instructs the jury that it is contended in this case that the city was misled by the notice given by the plaintiff of his intention to sue the defendant and describing the manner and place of his injury. Upon this question, the jury will consider at what place the officers of defendant were led to believe the accident occurred. If the jury determine that the accident to plaintiff occurred at ———, then you will say whether that was not substantially the place as described in plaintiff's notice. If so, it is not contended that the city was misled. The jury will consider what information the officers of defendant had from persons who saw the accident, as to where the accident really occurred, and whether the defendant was led to believe that plaintiff would assert the defect to be other than the defect which he had alleged on trial. The court cannot say as a matter of law, whether the city was misled or not, that is a

[107] Approved in Crittenden v. City of Mt. Clemens, 86 Mich. 220.

question of fact for you and if you should conclude that defendant was misled by the notice, then plaintiff has failed to comply with the law as to notice and is not entitled to recover. If the jury say that the city was not misled, then plaintiff having made out all other parts of his case, is entitled to recover, although the notice may not have been made with that accuracy which was possible.[108]

CHAPTER XCVI.

NAVIGABLE WATERS.

Diversion of current by sunken boats, 2135.
Rights and liabilities as between logs and vessels, 2136, 2137.

Diversion of current by sunken boats.

(2135) The court instructs the jury that, regarding the pontoons at one time kept and maintained by the defendant company, extending from the south pier up the south bank of the river testified to, you are instructed that the company owning the bridge was not, by law, required to put them there or keep them in position; yet, if the owners of the bridge, for the protection thereof or for any reason, kept them there, and they were from any cause sunk, and thereby diverted the current of the river from its usual and ordinary course or channel, thus causing difficulty or danger in the approaching of the bridge draw by boats; and that such change of the current caused or contributed to the collision of plaintiff's boat with the draw-rest of the bridge; you are authorized to find for the plaintiff, provided the plaintiff company, navigating its boats on the occasion of the collision, did so with care and skill, and did not contribute to the injury by its own neglect or improperly handling its vessel. Those navigating the river are under no obligation to remove wrecks which may be made in the ordinary and

[108] Hughes v. Lawrence, 160 Mass. 474.

proper course of navigation. While this is undoubtedly the law, it is also the law that he, who for his own benefit and not for the purpose of navigation or commerce uses any navigable part of a river, is liable in damages to the party injured, if such use causes a diversion and change in the ordinary course of the channel of the river, and thereby increases the difficulty and danger of navigation, and injury results therefrom.[1]

Rights and liabilities as between logs and vessels.

(2136) The court instructs the jury that, if they believe from the evidence, first, that the ——— river is a navigable stream where the plaintiffs' tug was, and that the defendants, or any of their employees who had charge of and were running logs for them, needlessly obstructed the navigation of the river so as to prevent the plaintiffs from passing along the river with their tug for the purpose of navigating said river in prosecuting their business as tug men, then the plaintiffs are entitled to recover; second, if you find from the evidence in the case that the ——— river is a navigable stream, and that the defendant's employees maintained a boom across said river, which boom obstructed the navigation of the river and thereby prevented plaintiffs from navigating the said river with their tug, plaintiffs are entitled to recover the damages they have sustained thereby; third, lumbermen or persons running logs cannot, by custom, acquire the right to obstruct a navigable stream by maintaining a boom across the river so as to prevent the passage of vessels along said river, and if they do so, they are liable for the proximate damages occasioned thereby.[2]

(2137) The court instructs the jury that, if they believe from the evidence that the ——— river in ——— county is a public highway, in which all persons have equal rights

[1] Approved in Missouri River Packet Co. v. Hannibal & St. J. R. Co. (C. C.) 2 Fed. 285.

[2] Gifford v. McArthur, 55 Mich. 535.

to pass and re-pass, and to navigate the same with boats, vessels and saw-logs and other floatable property then the plaintiffs could not dictate to the defendants, nor fix the time when they might enter that stream with their drive of saw logs and the rights of defendants in the river and to use it as a public highway are equal to those of plaintiffs. The rights of all persons therein are equal for all reasonable purposes, and vessels have no greater rights than saw logs. Each person has the right to the legitimate use of the stream, using reasonable care, and though he unavoidably impede or obstruct another temporarily, no action can be maintained. If defendants' logs were detained in the stream by reason of ———'s logs being in the stream ahead of them, blocking up the river, and defendants moved their logs as soon as they reasonably could after the obstruction of the other logs was removed, no action can be maintained and the verdict of the jury should be for the defendants. No man can be punished in damages for an enjoyment of his undoubted rights, when he acts reasonably and with prudence. Injury alone will not support an action on the case. The injury must be coupled with a wrong; and if the acts be not unlawful in themselves, then, unless done in a manner, at a time, or under circumstances which render them wrongful, there can be no liability for any injury that may result. In this case, in case the jury should find for the plaintiffs, the verdict should only be for the plaintiffs' actual damages by the detention, as appears from the evidence in the case.[3]

[3] Gifford v. McArthur, 55 Mich. 535.

CHAPTER XCVII.

NEGLIGENCE.

I. In General.

What constitutes negligence, 2138-2140.
Reasonable care, 2141.
Duty to test machinery, 2142.
Dangerous premises, 2143, 2144.
Effect of acts beyond defendant's control, 2145, 2146.
Liability for injuries to children, 2147, 2148.
Balloon ascension—Injury to child spectator, 2149-2151.
Accident on race track, 2152.
Burden and sufficiency of proof of negligence, 2153-2161.
Proximate cause of injury, 2162-2164.

II. Contributory Negligence.

What constitutes contributory negligence, 2165.
Effect on defendant's liability of plaintiff's negligence, 2166-2169.
Application of rule to children, 2170-2172.
Duty of injured person to anticipate negligence, 2173.
Careless driving of person injured, 2174, 2175.
Leaving horses unhitched and unattended, 2176.
Acts in emergencies, 2177-2181.
Injury avoidable notwithstanding contributory negligence, 2182, 2183.
Imputed negligence—Negligence of parent or custodian imputable to child, 2184-2188.
Same—Negligence of driver of vehicle, 2189-2193.
Burden of proof of contributory negligence, 2194-2200.

I. In General.

What constitutes negligence.

(2138) The court instructs the jury that negligence is the failure to observe, for the protection of the interests of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury.[1]

(2139) The court instructs the jury that "negligence" has

[1] Everett v. Richmond & D. R. Co., 121 N. C. 519.

been aptly defined to be the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, or the doing of something which a prudent and reasonable man would not do, under the circumstances of a given case. Before you can find for the plaintiff, therefore, you must find the defendant to have been guilty of negligence as alleged in the complaint. Another principle of law proper to be mentioned in this connection is, that if the plaintiff was himself guilty of negligence which materially contributed to the injury complained of, he cannot recover.[2]

(2140) The court instructs the jury that negligence and carelessness, applied to both plaintiff and defendant, means the failure to exercise ordinary care; that is, such care as ought to be expected of a reasonably prudent person under similar circumstances.[3]

Reasonable care.

(2141) The court instructs the jury that what is reasonable care in a given case is to be determined by the circumstances and facts of that particular case. Negligence, or, what is the same thing, the absence of reasonable care, as already stated, is the foundation of this action; and it is to be determined by what the jury find an ordinarily prudent and careful man would have done under the particular circumstances of this case. If, tried by this rule, you find the defendant was not guilty of the negligence which produced the injury complained of, your verdict should be for the defendant. On the other hand, if, tried by this rule, you find the defendant was negligent in the management of the car in question, and that such negligence produced the injury complained of, you should find for the plaintiff, unless you find

[2] Approved in Traver v. Spokane St. Ry. Co., 25 Wash. 225.
[3] Approved in Henry v. Grand Ave. R. Co., 113 Mo. 525.

that he was guilty of contributory negligence, as heretofore defined.[4]

Duty to test machinery.

(2142) The court instructs the jury that neither the defendant company, nor any one else using steam boilers, owe a duty, either to their own employees or to third persons, to tear their machinery and boilers to pieces and send them abroad to be stretched and tested before operating. Such a rule would be unreasonable. We have previously announced the rule as to measure of the duty owners and users of machinery and boilers are required to observe.[5]

Dangerous premises.

(2143) The court instructs the jury that those latent defects which are either concealed in defective workmanship, or are incident to the ordinary wear and tear of houses, are among the casualties which no man can avoid without the extraordinary care and vigilance which the law does not impose. If you believe from the evidence that the platform was constructed in a good and substantial manner, and gave no indication of being unsafe, up to the accident, then I instruct you the defendant was under no legal obligation to have the said platform inspected from time to time; and if you find from the evidence that the defect in said platform was secret and unknown to defendant, and was incident to the ordinary wear and tear of said platform, then you will find a verdict for defendant.[6]

(2144) The court instructs the jury that the defendant had a right to open the trap-door in question, and defendant's servant had a right to assume that persons using the street at that point would exercise ordinary care and caution to avoid injury from the crow-bar in question; and such

[4] Approved in Traver v. Spokane St. Ry. Co., 25 Wash. 225.
[5] Approved in Baran v. Reading Iron Co., 202 Pa. St. 274.
[6] Baddeley v. Shea, 114 Cal. 1.

servant was not negligent, unless a person in his situation and engaged in what he was actually doing, would in view of the then use of the street, have anticipated the possibility of a footman passing the point in question, and of injury to such footman in the exercise of ordinary care, from the manner in which the jury believe from the evidence such servant of defendant was using the crow-bar at the time in question.[7]

Effect of acts beyond defendant's control.

(2145) The court instructs the jury that, if the loss in this case resulted wholly from the extraordinary floods, and not from any assisting or producing act of the defendant, then the plaintiff could not recover here, and the defendant would not be responsible.[8]

(2146) The court instructs the jury that defendant, in order to maintain the defense that the loss was due to an inevitable accident, must show by the evidence that the accident was such that the defendant could not have avoided it by the use of that kind and degree of care which he was under a duty to exercise in the circumstances in which he was placed.[9]

Liability for injuries to children.

(2147) The court instructs the jury that defendant was under no obligation to plaintiff to keep its lumber yard in safe or proper condition for plaintiff to play there. The yards were its property and it was entitled, as to plaintiff, to use them for piling lumber and to pile the same in such form as it found convenient, with due regard to the safety of such persons only as might properly use the yards. It was under no obligations to so pile or place its bridge ties as to prevent injury to a child climbing upon them, or to so pile, fasten, or brace the same that the child could not, in trying to

[7] Approved in Henry v. Grand Ave. R. Co., 113 Mo. 525.
[8] Approved in Helbing v. Allegheny Cemetery Co., 201 Pa. St. 171.
[9] Brown v. Kendall, 6 Cush. (Mass.) 296.

climb thereon, pull one or more of them down upon herself, nor can it be held negligent for failing to so pile, brace, or secure them, if the injured person was at the time thereon without its knowledge or invitation.[10]

(2148) The court instructs the jury that defendant was under no obligation to keep watch over its premises, in order to exclude children therefrom. If the watchman of defendant discovered plaintiff with others playing in the yard shortly before the accident, and requested them to leave; and plaintiff thereupon withdrew from the premises, but thereafter returned without the knowledge of defendant's watchman or person in charge of its property, for the purpose of playing in the yard, and while so doing was injured, without such watchman having knowledge of her being then present; and while playing there pulled down upon herself or caused to fall a tie, or portion of a pile of ties, upon which she was climbing; defendant would not be liable to plaintiff for any injury so received.[11]

Balloon ascension—Injury to child spectator.

(2149) The court instructs the jury that if they believe from the evidence that the defendant invited persons to ——— Park to see a balloon ascension on the —— day of ——, 19—, and that the defendant in making said balloon ascension, did use such reasonable care as an ordinarily prudent man would have used under similar circumstances, for the protection of such persons as might assemble there to see said balloon ascension in pursuance of said invitation, then the jury must find for the defendant company. Ordinary care is such care as an ordinarily prudent person would exercise under similar circumstances.[12]

(2150) The court instructs the jury that the law does not

[10] Approved in Missouri, K. & T. Ry. Co. of Texas v. Edwards, 90 Tex. 65.

[11] Approved in Missouri, K. & T. Ry. Co. v. Edwards, 90 Tex. 65.

[12] Richmond & M. Ry. Co. v. Moore's Adm'r., 94 Va. 493.

require a man on his own premises, in the performance of an act in itself free from hazard or danger, to use extraordinary foresight, care and prudence in the performance of such act; but such care, prudence, and foresight need only be commensurate with the hazard and danger incident to the act. If the jury shall believe from the evidence that the use of poles in said balloon ascension was not extraordinarily dangerous or hazardous, and that the defendant, in throwing down said poles used ordinary care and prudence to prevent injury to the persons there assembled,—children as well as adults,—then the jury must find for the defendant.[13]

(2151) The court instructs the jury that if they believe from the evidence that the boy came upon the premises of the defendant on the —— day of ——, 19—, without an invitation, either express or implied, from said defendant, then he was a mere licensee and the said defendant was liable to him, if injured upon his premises, for wanton injuries only and they must find for the defendant, unless they further believe the said boy was wantonly injured whilst on the premises of the defendant.[14]

Accident on race track.

(2152) The court instructs the jury that the defendants were bound to adopt such precautions to keep the track clear and prevent persons from driving on the track during the race, as men of ordinary care and prudence would adopt under similar circumstances; and it was not enough to order men off the track, but they should have had a force sufficient to keep them off, they being bound to use due and proper skill and care to prevent any person engaged in the race from being injured by the ignorant, negligent or reckless acts of the spectators, or persons not engaged in the race; that the degree of care the defendants were bound to use in such a

[13] Richmond & M. Ry. Co. v. Moore's Admr., 94 Va. 493.

[14] Richmond & M. Ry. Co. v. Moore's Adm'r, 94 Va. 493.

case as this must be measured by the extent of peril to human life and limb which would be occasioned by neglect and must therefore be the highest which may reasonably be exercised in order to prevent those injuries which human foresight could avert; the defendants were not bound at all events to keep the track clear; and the plaintiff did not make out his case by only showing that there was an obstruction on the track, but he must show that the defendants had in some way failed in their duty, which was to use every effort which reasonable men could be expected to use to keep the track clear.[15]

Burden and sufficiency of proof of negligence.

(2153) The court instructs the jury that it is incumbent upon the plaintiffs to prove negligence upon the part of the defendant which resulted in the accident by a fair preponderance of evidence.[16]

(2154) The court instructs the jury that negligence in this defendant is not to be presumed; but the burden of proof is upon the plaintiffs to satisfy the jury by a preponderance of evidence, that the defendants are chargeable with negligence.[17]

(2155) The court instructs the jury that, if under all the evidence submitted in the cause, you shall come to the conclusion that the plaintiffs have not succeeded in establishing the fact of negligence upon this defendant company by satisfactory and fairly preponderating evidence, bearing in mind that the mere fact of the explosion of this boiler is not of itself evidence of negligence, then the defendant company is entitled to your verdict.[18]

(2156) The court instructs the jury that the charge of negligence made by plaintiff against defendant by this action

[15] Approved in Goodale v. Worcester Agricultural Soc., 102 Mass. 401.

[16] Approved in Baran v. Reading Iron Co., 202 Pa. St. 274.

[17] Approved in Baran v. Reading Iron Co., 202 Pa. St. 274.

[18] Approved in Baran v. Reading Iron Co., 202 Pa. St. 274.

must be proved to the satisfaction of the jury by the preponderance of the evidence. The jury have no right to presume negligence; and, if the evidence does not preponderate in favor of plaintiff, then the verdict should be for defendant.[19]

(2157) The court instructs the jury that negligence is never to be presumed; and the fact that an accident occurred on ———, 19—, would not justify the jury in inferring from the fact that an explosion took place, that it was caused by the negligence of the defendant, for the reason that it might have occurred without any fault of the defendant whatever.[20]

(2158) The court instructs the jury that the mere fact that an explosion occurred, which caused the death of the infant in this case, is not enough to establish negligence of the defendant company. There must be additional and affirmative proof of the particular negligence which caused the explosion in this case.[21]

(2159) The mere fact of the explosion of this particular boiler on the evening of ———, 19—, standing by itself and independent of other facts, is no evidence of the company's negligence or want of proper care in the use of the boiler. It will be presumed, until the contrary appears, that this company had a care and due regard for the preservation of their own property, the safety of their own employees and others, as well as of themselves.[22]

(2160) The court instructs the jury that defendants were at the time of the explosion and before, in the exercise of a lawful right in using and operating steam boilers on their own premises in the management of this industry. Other facts,

[19] Approved in Guinney v. Southern Electric Ry. Co., 25 Am. & Eng. Ry. Cas. (N. S.) 820.

[20] Approved in Baran v. Reading Iron Co., 202 Pa. St. 274.

[21] Approved in Baran v. Reading Iron Co., 202 Pa. St. 274.

[22] Approved in Baran v. Reading Iron Co., 202 Pa. St. 274.

establishing the fault or negligence of the owners, the defendants, besides the mere fact of the explosion itself, are necessary to be proved in order to fix a liability for damages.[23]

(2161) The court instructs the jury that it is not enough to say or find that there is some evidence of negligence on defendant's part. A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendant, will not warrant the jury in finding a verdict for the plaintiffs. There must be evidence upon which the jury can reasonably conclude that there was negligence.[24]

Proximate cause of injury.

(2162) The court instructs the jury that, if you believe from the evidence that such injury as the plaintiff claims he has sustained could not have resulted without leaving such marked traces of deformity as would manifest itself to medical experts, so as to enable them to detect the cause of his present physical condition, aside from the mere wasted and shrunken condition of the muscles of his right arm and shoulder and you further believe from the evidence that the wasted and shrunken condition may have resulted from simple disease without injury, and no such nor any traces of deformity can be discovered as would account for the wasting of the muscles; then you are bound to attribute it to disuse.[25]

(2163) The court instructs the jury that if you find from the weight of the testimony that the sole cause of the loss was an extraordinary flood,—of course, the ——— company would not be responsible for that,—and your verdict should be for the defendant. If, however, the weight of the evidence satisfies you that the loss was the result of two concurrent acts, an extraordinary flood and some negligence of the ——— company assisting in producing the loss, then the ——— company would be liable.[26]

[23] Approved in Baran v. Reading Iron Co., 202 Pa. St. 274.

[24] Approved in Curtis v. Detroit & M. R. Co., 27 Wis. 158.

[25] Approved in Allison v. C. & N. W. R. Co., 42 Iowa, 274.

[26] Approved in Helbing v. Allegheny Cemetery Co., 201 Pa. St. 171.

(2164) The court instructs the jury that plaintiff was in the employ of defendant, having charge of defendant's horses; and that on one occasion while plaintiff was in charge of the horses of defendant, defendant attempted to chastise a horse by beating the horse and that while engaged in so beating the horse, defendant struck the plaintiff unintentionally, inflicting the injuries here sued for; and that if you believe from the evidence that the defendant in so beating the horse was doing an unlawful act, then the defendant is liable for the injuries so inflicted upon plaintiff, though the jury may believe from the evidence that the blow struck by the defendant was unintentional, and though the jury may believe from the evidence that the defendant used reasonable care to avoid striking plaintiff.[27]

II. Contributory Negligence.

What constitutes contributory negligence.

(2165) The court instructs the jury that contributory negligence is the failure to use that ordinary care and diligence that would be expected of an ordinarily prudent person under like circumstances to avoid an injury. Thus, even though you may find that the defendant was negligent, still, if you further find that plaintiff, B., did not exercise that ordinary care and diligence to prevent injury to himself that would be expected of an ordinarily prudent person situated as he was, you should find for the defendant.[28]

Effect on defendant's liability of plaintiff's negligence.

(2166) The court instructs the jury that to entitle the plaintiff to recover in this action, the jury must find from the evidence that the accident or injury complained of was caused altogether and entirely by the negligence and want of

[27] Osborne v. Van Dyke, 113 Iowa, 557.

[28] Approved in Galveston, H. & S. R. Co. v. Bonnett (Tex. Civ. App.) 38 S. W. 813.

due care by the defendant or its servants and employes, and that the injured plaintiff did not directly contribute to the said accident by negligence or by want of prudence and ordinary care on her part.[29]

(2167) The court instructs the jury that if they find from the evidence that the accident complained of was caused by the want of ordinary care on the part of the defendant in the running of its cars, and shall also find that the want of ordinary care and prudence on the part of the plaintiff, directly contributed thereto, then the plaintiffs are not entitled to recover.[30]

(2168) The court instructs the jury that if they find from the evidence in this case that the accident complained of was in any degree owing to the want of due care and caution on the part of the plaintiff, directly contributing to said accident, then their verdict must be for defendant.[31]

(2169) The court instructs the jury that if there was negligence on the part of the deceased which contributed in any degree to bring about the catastrophe then although the defendant might have been also guilty of negligence, the verdict must be for the defendant. The defendant is liable only in case of catastrophe brought about by its own culpable negligence, and without any negligence on the part of the deceased contributing to it.[32]

Application of rule to children.

(2170) The court instructs the jury that the rule that refuses damages to an individual whose negligence, however slight, has in any manner contributed to produce the injury for which he sues, presupposes that he has reached an age when he has sufficient intelligence to know the existence of

[29] Approved in Baltimore & Ohio R. Co. v. Owings, 65 Md. 502.

[30] Approved in Baltimore & Ohio R. Co. v. Owings, 65 Md. 502.

[31] Approved in Philadelphia, W. & B. R. Co. v. Anderson, 72 Md. 519.

[32] Button v. Hudson R. R. Co., 18 N. Y. 248.

danger, and sufficient thought to protect himself from its consequences. This rule, therefore, does not and cannot apply to an infant of two years or less; and if an infant of that age is found alone in a place where he is exposed to danger, and in a situation where he can easily be seen, it is the duty of every person approaching him to use all the care and caution that such person may command to avoid injury to him; and if such person fail to use such care and caution, and injury results to the infant from the want of such care and caution, such person is guilty of negligence and would be liable to the infant for the injuries so caused, had such infant survived such injury.[33]

(2171) The court instructs the jury that the rule of law as to negligence in children is, that they are required to exercise only that degree of care and caution which persons of like age, capacity and experience might be reasonably expected to naturally or ordinarily use in the same situation and under the like circumstances, provided that the parents or persons having the control of such children have not been guilty of want of ordinary care in allowing them to be placed in such circumstances.[34]

(2172) The court instructs the jury that, if they shall find from the evidence that the death of the child resulted from the want of ordinary care and caution on the part of a driver in the employment of the defendant, the plaintiff is entitled to recover; provided the jury find that the accident causing her death could not have been avoided by the exercise of such care and caution by the child as ought, under all the circumstances, to have been reasonably expected from one of her age and intelligence, or by the exercise of ordinary care and caution on the part of the father of the child, or of the person accompanying the child at the time of the accident.[35]

[33] Approved in Walters v. Chicago, R. I. & P. R. Co., 41 Iowa, 75.

[34] Approved in Illinois Cent. R. Co. v. Slater, 129 Ill. 91.

[35] Approved in Baltimore & O. R. Co. v. State, use of Fryer, 30 Md. 47.

Duty of injured person to anticipate negligence.

(2173) The court instructs the jury that it is an established rule of law that one person will not be allowed to impute a want of vigilance to another injured by his act, if that very want of vigilance were the consequence of an omission of duty on his part; that is, if the defendant, by his own act, throws a plaintiff off his guard, the plaintiff's lack of vigilance cannot be regarded as negligence, and one is not chargeable with contributory negligence in failing to anticipate the negligence of another, and in not providing against it. Every one has a right to presume that others will act in a lawful and proper manner; consequently, the law will not hold it imprudent in a plaintiff to act upon a presumption that the defendant has done or will do his duty.[36]

Careless driving of person injured.

(2174) The court instructs the jury that the plaintiff was required to have used such care in driving and crossing the ditch as an ordinarily prudent man would use in like circumstances, and if you believe from the evidence that plaintiff failed to use such care for his own protection and safety in driving and selecting a place for crossing the ditch as an ordinary man would use under like circumstances, then your verdict will be for defendant.[37]

(2175) The court instructs the jury that, if you find that the ditch was dangerous, that defendant had been guilty of permitting it to become and remain in such condition; still, if you find that plaintiff was guilty of negligence in the manner in which he attempted to cross and that his negligence contributed to the accident, and that the accident would not have occurred if plaintiff had exercised reasonable care; the plaintiff cannot recover.[38]

[36] Steele v. Northern Pac. Ry. Co., 21 Wash. 287.

[37] Approved in City of Austin v. Ritz, 72 Tex. 391.

[38] Approved in City of Austin v. Ritz, 72 Tex. 391.

Leaving horses unhitched and unattended.

(2176) The court instructs the jury that the plaintiff in this case sues to recover for injuries which he claims to have sustained through the negligence of the defendant in driving the defendant's horses and carriage against the carriage and horses of the plaintiff, thereby frightening plaintiff's horses and causing plaintiff's horses to run away, and thereby producing the injuries here sued for. The court instructs the jury that, if they believe from the evidence that defendant was guilty of carelessness and negligence as claimed by the plaintiff, but that the acts of defendant were not wanton or willful, the plaintiff cannot recover, if he himself, by leaving his horses unhitched and unattended did not exercise reasonable care and prudence, and if the want of such care and prudence contributed essentially to produce the injuries here sued for. In order to determine whether plaintiff failed to exercise reasonable care and prudence in leaving his horses unfastened and unattended, they may take into consideration the character, disposition and temper of the horses, the manner in which they had been trained, as well as all the other circumstances attending the transaction.[39]

Acts in emergencies.

(2177) The court instructs the jury that, even though the jury may believe from the evidence that the plaintiff received the injuries complained of by reason of his jumping from the defendant's car at the time of the wreck; yet if the jury further believe from the evidence that the plaintiff was so stunned and bewildered by the shock of the collision as to render said plaintiff unconscious of what he was doing; then the jury are instructed that said jumping was not such negligence as to prevent plaintiff from recovering damages, any more than if he had received said injuries complained of while in defendant's car, although the jury may further be-

[39] Park v. O'Brien, 23 Conn. 339.

lieve from the evidence that no injury would have been received by him if he had remained in the car.[40]

(2178) The court instructs the jury that, if they should believe from the evidence that the plaintiff jumped from the defendant's car at the time of the wreck; yet if they further believe from the evidence that said plaintiff did so under a well-grounded fear of danger to his life or limbs; plaintiff is as much entitled to recover in this action, so far as his jumping is concerned, as if he had received the injuries complained of while in defendant's car, although they may further believe from the evidence that if he had remained in the car he would not have been injured.[41]

(2179) The court instructs the jury that, if they believe from the evidence that plaintiff was through the negligence of the defendant placed in extreme peril, and, under the necessity of acting suddenly to avoid the peril, plaintiff acted in a manner in which under ordinary circumstances he would not have acted, and which under ordinary circumstances would have been negligent; and if the jury believe from the evidence plaintiff received the injury sued for in this case through a mistake of judgment in acting under the pressure of the sudden peril; then the jury are instructed that the said mistake of judgment or the imprudent action of the plaintiff in the presence of the peril will not prevent him from recovering for injuries sustained; and in such case the negligent act of the defendant is the proximate cause of the injury.[42]

(2180) The court instructs the jury that where one is placed, by the negligent acts of another, in such a position that he is compelled to choose upon the instant and in the face of apparent great and impending peril between two hazards; and he makes such a choice as a person of ordinary

[40] Approved in Baltimore & O. R. Co. v. McKenzie, 81 Va. 71.
[41] Approved in Baltimore & O. R. Co. v. McKenzie, 81 Va. 71.
[42] Approved in Baltimore & O. R. Co. v. Few's Ex'r, 94 Va. 82,

prudence, placed in the same situation, would probably have made, and injury results therefrom; the fact that if he had chosen the other hazard he would have escaped injury, does not show negligence.[43]

(2181) The court instructs the jury that when one is placed, by the negligence of another, in a situation of peril, his attempt to escape danger, even by doing an act which is in itself dangerous and from which injury results, is not contributory negligence such as will prevent him from recovering. If a man is in danger, and in order to avoid that danger, bona fide does something which is dangerous, that would not be considered in law contributory negligence.[44]

Injury avoidable notwithstanding contributory negligence.

(2182) The court instructs the jury that one who is injured by the mere negligence of another cannot recover any compensation for his injury, if he, by his own ordinary negligence or willful wrong, contributed to produce the injury of which he complains; so that, but for his concurring and co-operating fault, the injury would not have happened to him, except when the direct cause of the injury is the omission of the other party, after becoming aware of the injured party's negligence to use a proper degree of care to avoid the consequences of such negligence.[45]

(2183) The court instructs the jury that notwithstanding the jury may find that the plaintiff was guilty of negligence, and that such negligence contributed to the injury of which she complains; yet still if the agents of the defendant were aware of such negligence in time, by the use of ordinary care and prudence to have avoided the effect of such negligence on her part, but did not do so, then such negligence on her

[43] Approved in Wilson v. Northern Pac. R. Co., 26 Minn. 278.

[44] Approved in Mitchell v. Charleston Light & Power Co., 45 S. C. 146.

[45] Approved in Cooper v. Central R. Co. of Iowa, 44 Iowa, 134.

part is not such contributory negligence as to constitute a defense to this action.[46]

Imputed negligence—Negligence of parent or custodian imputable to child.

(2184) The court instructs the jury that it was the duty of the plaintiffs, in the care and custody of their son, to have exercised such degree of care and prudence in keeping him off defendant's railroad track and out of danger which was reasonable and prudent under like circumstances, as shown by the evidence; and a failure to exercise such a degree of care and prudence would render plaintiffs guilty of negligence.[47]

(2185) The court instructs the jury that, as pertinent to the question of care on the plaintiff's part, as to the child, the jury may consider whether the deceased was of such tender years as to be likely to be inconsiderate and improvident and, therefore, to have required for its own safety, the control, oversight and vigilance of parents or other matured person; and if they so find, then they should inquire whether the parents or other matured person were exercising, when the death happened, a care and prudence as to the person of the deceased which judicious and careful parents, or persons having care of a child of like age, ought to exercise.[48]

(2186) The court instructs the jury that, if they find the deceased was of such an age as to require the custody of his parents to insure his personal safety when in the streets; and if it appears from the evidence that his parents knew there was such a dangerous place as the tank, and negligently permitted the deceased to stray and wander in the streets by

[46] Approved in Philadelphia, W. & B. R. Co. v. Hogelans, 66 Md. 149.

[47] Approved in Schmitt v. Missouri Pac. Ry., 20 Am. & Eng. Ry. Cas. (N. S.) 216.

[48] Approved in City of Chicago v. Major, 18 Ill. 349.

himself, near such tank, they did so at their own peril, and their neglect must be imputed to the infant, and no recovery can be had by the plaintiff.[49]

(2187) The court instructs the jury that it does not necessarily follow, because a parent negligently suffers a child of tender age to cross a street, that therefore the child cannot recover. If the child, without being able to exercise any judgment in regard to the matter, yet does no act which prudence would forbid and omits no act that prudence would dictate, there has been no negligence which was directly contributory to the injury. The negligence of the parent in such a case would be too remote.[50]

(2188) The court instructs the jury that, if they believe from the evidence in this case that the plaintiff permitted his decedent ———, a boy about nine years of age to go from his home at ——— after, or to get, his elderberries, but did not know that he was going to ride on a handcar; he, the plaintiff, is not by reason of such permission guilty of contributory negligence, and the defendant cannot be relieved from liability solely because the plaintiff thus permitted his said son to go from home.[51]

Same—Negligence of driver of vehicle.

(2189) The court instructs the jury that every person is bound to know that a railroad crossing is a dangerous place, and he is guilty of neglect unless he approaches it as if it were dangerous. If S., the driver of the team in question, knew the crossing where the accident complained of occurred was a dangerous one, he was bound to know that a train might be approaching; and if he did not look or listen to ascertain if one was coming, but, on the contrary, drove directly on the track, and the accident resulted, he was guilty of such neg-

[49] Approved in City of Chicago v. Major, 18 Ill. 349.

[50] Approved in Wiswell v. Doyle, 160 Mass. 42.

[51] Approved in Davidson v. Pittsburg, C., C. & St. L. Ry. Co., 41 W. Va. 407.

ligence as precludes the plaintiffs from recovering in this case, unless the plaintiffs have gone further and proven to the satisfaction of the jury that the railway company upon such occasion was guilty of gross negligence.[52]

(2190) The court instructs the jury that, if the evidence in this case shows that S., the driver, took the risk of crossing in front of the engine before it could strike him and in this he was mistaken, that he miscalculated, and from any cause of his own was not able to pass safely in front, the plaintiffs must bear the loss, and the jury must find for the defendant.[53]

(2191) The court instructs the jury that if they find from the preponderance of the evidence that the plaintiff was injured as charged in her declaration by reason of the alleged negligence of the defendant; and that at, and before, the time of receiving such injury the plaintiff was in the exercise of ordinary care and caution for her own safety; and that, when injured, she was riding in the cutter in question as the invited guest of B.; then, even though it should appear that said B. was guilty of some want of care that contributed in some measure toward the bringing about of the accident in question, such want of care, if any, on the part of said B., will not be imputable to the plaintiff.[54]

(2192) The court instructs the jury that, if the jury find from the evidence that W., the driver on the occasion in question, failed to exercise even a slight want of ordinary care, in consequence of which the plaintiff was thrown from the wagon and was injured, then the plaintiff is not entitled to recover.[55]

(2193) The court instructs the jury that, if they believe

[52] Approved in Chicago & N. W. R. Co. v. Hatch, 79 Ill. 137.

[53] Approved in Chicago & N. W. R. Co. v. Hatch, 79 Ill. 137.

[54] Approved in West Chicago St. R. Co. v. Petters, 25 Am. & Eng. Ry. Cas. (N. S.) 612.

[55] Otis v. Town of Janesville, 47 Wis. 422.

from the evidence that the plaintiff was riding in a vehicle driven by the owner of the vehicle, over which she neither assumed nor exercised any control, and over which she had no control; and she was injured in a collision at a railway crossing on the public highway by a railway train, without any negligence on her part, if the negligence of the driver in driving upon the crossing contributed to said injury; then said contributory negligence cannot as a matter of law be imputed to her.[56]

Burden of proof of contributory negligence.

(2194) The court instructs the jury that the burden of proof is on the plaintiff. He must show, or there must appear from the evidence, not only negligence on the part of the defendant, but that the care and circumspection demanded in relation to the party injured was properly exercised, so as to indicate that plaintiff's own negligence, if of sufficient age and experience to exercise caution, or that of those who were bound to care for the party injured, if not able to exercise it for himself, did not contribute to produce the injury complained of.[57]

(2195) The court instructs the jury that the plaintiff must show that the negligence of the defendant, or its employees, caused the injury complained of, and that plaintiff in no way directly contributed to the injury.[58]

(2196) The court instructs the jury that the burden of proof is on the plaintiff to show both the negligence of the defendant and the care of the deceased; that is, such care as a child of his age and discretion would naturally use. But she is not bound to do more than raise by her proof a reasonable presumption of negligence. If the facts proved make

[56] Approved in Atlantic & D. R. Co. v. Ironmonger, 95 Va. 625.

[57] Approved in City of Chicago v. Major, 18 Ill. 349.

[58] Approved in Locke v. S. C. & P. R. Co., 46 Iowa, 109. Use of word "directly" was objected to.

it probable that the defendant neglected its duty, it is for the jury to decide whether or not it did so.[59]

(2197) The court instructs the jury that, in order to defeat a recovery in this suit on the ground of contributory negligence upon the part of the plaintiff, the burden of proof is upon the defendant to show that the plaintiff was guilty of negligence, and that such negligence on her part directly contributed to produce the injury.[60]

(2198) The court instructs the jury that, in order to defeat a recovery on the ground of contributory negligence on plaintiff's part, the defendant must satisfy the jury by preponderating evidence of two facts: first, that the plaintiff was negligent; and second, that such negligence directly contributed to the injury.[61]

(2199) The court instructs the jury that the plaintiff, M., is presumed to have exercised due and proper care at the time of the wreck at which he was injured, and the burden of proving he was negligent is upon the defendant.[62]

(2200) The court instructs the jury that by the term "ordinary care and prudence," as used in these instructions, is meant that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances; and a failure to exercise ordinary care as so defined is negligence. The burden of proving that J. G. did not exercise ordinary care to avoid the collision and injury which resulted in his death, is upon defendant.[63]

[59] Approved in McMillan v. B. & M. R. Co., 46 Iowa, 231.

[60] Approved in Philadelphia, W. & B. R. Co. v. Hogeland, 66 Md. 149.

[61] Approved in Philadelphia, W. & B. R. Co. v. Anderson, 72 Md. 519.

[62] Approved in Baltimore & O. R. Co. v. McKenzie, 81 Va. 71.

[63] Approved in Guinney v. Southern Electric R. Co., 25 Am. & Eng. Ry. Cas. (N. S.) 820.

CHAPTER XCVIII.

NEGOTIABLE INSTRUMENTS.

Consideration, 2201-2204.
Same—Evidence of consideration as between parties, 2205.
Same—Note given for satisfaction of another's debt, 2206.
Same—Burden of proof of consideration, 2207.
Same—Note given to settle criminal offenses, 2208, 2209.
Liability as dependent on time of signing, 2210.
Delivery in violation of instructions, 2211.
Liability on notes signed "I" or "we" promise to pay, 2212.
Checks—Liability of drawer, 2213, 2214.
Drafts, 2215.
Accommodation notes, 2216-2218.
Same—Liability where note retained by principal debtor, 2219, 2220.
Same—Qualified delivery, 2221, 2222.
Same—Diversion of note from its purpose to one having knowledge, 2223.
Same—Burden of proof, 2224.
Liability of indorser in general, 2225-2228.
Whether liability that of indorser or joint maker, 2229, 2230.
Blank indorsement, 2231.
Service of notice of dishonor—Failure cured by subsequent acknowledgment of liability, 2232-2235.
Burden of proof as to character in which note is signed, 2236.
Bona fide purchasers, 2237, 2238.
Same—Presumptions and burden of proof, 2239, 2240.
Collateral security, 2241, 2242.
Payment, 2243.
Lost or destroyed notes, 2244.
Right of receiver to sue on note, 2245.
Plea of usury in action on note by purchaser, 2246, 2247.
Prima facie case made by introduction of notes, 2248, 2249.
Parol evidence to show agreement as to liability, 2250.
Form of verdict, 2251.

Consideration.

(2201) The court instructs the jury that the legal effect

of the deed of trust (which has been read in evidence), and the said notes recited in said deed, is to indicate a transaction in which B. issued the said notes as part payment of the purchase price of certain land in ———. The jury is further instructed, that by his answer in this case defendant admits that the title to the land (described in the deed of trust) was conveyed to defendant before said deed of trust was executed by defendant. The court instructs you that the right to possession of said land, which defendant acquired by the admitted conveyance of title to him by S., was, if so intended by him and the officers of the bank with whom he had the transaction, a valuable consideration for the notes mentioned in the deed of trust and sued upon in this case.[1]

(2202) The court instructs the jury that referring to the first count (or claim on the $5,000 note), if they find and believe from all the evidence that said note was signed and delivered by B. to the bank, (or to S. as its president,) in order to raise funds for the benefit of the —— Company, and that said company accordingly obtained a credit with the bank for $5,000 by reason of the said giving of said note by B., then said note is, in law, based on a valuable consideration; and if the jury find the facts to be as above stated, they should find for the plaintiff as to the $5,000 note, and interest to date at the rate mentioned in said note.[2]

(2203) The court instructs the jury that as a rule, where there is no fraud, and a party receives all the consideration he contracted for, the contract will not be set aside for want or failure of consideration; and where the value of the consideration is indefinite and uncertain, the parties have a right to determine it for themselves, and courts and juries ought not to overturn their decisions upon its sufficiency; and whether one contracts for the performance of an act, or several acts, which will afford him pleasure, gratify his ambition, or please

[1] Approved in Chicago Title & Trust Co. v. Brady, 165 Mo. 197.

[2] Approved in Chicago Title & Trust Co. v. Brady, 165 Mo. 197.

his fancy, his estimate of the value should be left undisturbed. And the fact that love and affection or kinship may have been a part of the consideration, cannot defeat the plaintiff's right of recovery.[3]

(2204) The court instructs the jury that it is contended on the part of the defendants that if the said D. executed said note to the plaintiff, he did it upon the consideration that the plaintiff would quit the patent-right business, go home and stay with his family, and sell no more patent-rights or gates as long as D. lived; but the defendants further contend that the consideration of said note has failed, and that the plaintiff, after the making of said note, sold patent-rights and gates, and therefore said note is void. The burden of proof is on the defendants to prove this contention by a preponderance of the evidence. In order to defeat the collection of said note under this branch of the defendants' contention, the defendants must prove by a preponderance of the evidence that all said consideration failed. If all the consideration of said note did not fail, then the note is valid so far as the consideration is concerned.[4]

Same—Evidence of consideration as between parties.

(2205) The court instructs the jury that as between the maker and the payee of a promissory note, oral evidence touching the consideration thereof may be considered by you; and if you find from the evidence in this case that the defendant B. received no consideration for the signing of the notes sued on, and that the same were made for the accommodation of the G. S. Bank, then your verdict should be for the defendant.[5]

Same—Note given for satisfaction of another's debt.

(2206) The court instructs the jury that if H. owed to

[3] Approved in Ray v. Moore, 24 Ind. App. 480.
[4] Approved in Ray v. Moore, 24 Ind. App. 480.
[5] Approved in Chicago Title & Trust Co. v. Brady, 165 Mo. 197.

the plaintiff the amount of the note sued upon, and if the property of H. was under the control of the defendant; and if, at the request of H., the defendant gave to the plaintiff the note used upon in satisfaction of the debt of H., to the plaintiff, and the plaintiff accepted the note as such satisfaction; then the note was given upon sufficient consideration, and the plaintiff is entitled to recover the amount due upon the note. What are the facts the jury must determine from the evidence, and from that alone; and nothing in any instruction is to be taken as any intimation by the court as to what any of the facts are.[6]

Same—Burden of proof of consideration.

(2207) The court instructs the jury that the burden of proof was on the plaintiff to show that the note was given upon a valuable consideration, and that, if that was doubtful upon the whole evidence, he could not recover; that proof of the execution of the note and its production in evidence made a prima facie case for the plaintiff, upon which they might find a verdict for him, unless the defendant introduced evidence which showed either that it was not given for a valuable consideration, or that the consideration had failed, or evidence to render it doubtful in their minds whether it was given on a valuable consideration; and that if not so given, or if it was doubtful whether it was given for a valuable consideration, either for want of consideration or for failure of consideration, the plaintiff could not recover.[7]

Same—Note given to settle criminal offenses.

(2208) The court instructs the jury that to entitle the defendant to a verdict, you must believe from the evidence that there was a mutual understanding between C. and the defendant that the criminal prosecution should be suppressed. It will not be sufficient that defendant was induced to give

[6] Approved in Harris v. Harris, 180 Ill. 157.

[7] Approved in Burnham v. Allen, 67 Mass. (1 Gray) 496.

said note by understanding the prosecution would be suppressed, unless C. also so understood; defendant will not be enabled to avoid the note on the ground that C. was induced to abstain from prosecuting K. by the giving of this note, unless there was a mutual understanding as aforesaid.[8]

(2209) The court instructs the jury that a note to settle an embezzlement or a shortage of an agent is valid and good, if it was given to settle the indebtedness or shortage, and if there is no agreement to stifle the prosecution for the embezzlement.[9]

Liability as dependent on time of signing.

(2210) The court instructs the jury that it would make no difference with the liability of ——— as the maker of the note that it was not signed by him at the time it was originally made by ———. His liability would be the same if he subsequently signed it and sold and delivered it to the plaintiff for a valuable consideration, as if he had signed it when first made.[10]

Delivery in violation of instructions.

(2211) The court instructs the jury that although the witness, T., delivered the note in suit to witness, Y., in violation of the instruction of defendants, and although he communicated his instructions to witness, Y., at the time of such delivery, yet, if the jury find and believe from the evidence that after said delivery, and after having knowledge that H. had not signed said note, defendants approved and adopted as their own the act of said T. in making said delivery to said Y., the verdict should be for the plaintiff.[11]

Liability on notes signed "I" or "we" promise to pay.

(2212) The court instructs the jury for the plaintiff, that

[8] Approved in Clark v. Pomeroy, 94 Mass. 557.
[9] Approved in Wolf v. Troxell's Estate, 94 Mich. 575.
[10] Approved in Cook v. Brown, 62 Mich. 473.
[11] Approved in Hurt v. Ford (Mo.) 36 S. W. 671.

where a note is signed by two persons, both are equally liable, and either one or both may be sued thereon; and it makes no difference whether the note read, "I promise to pay," or "we promise to pay," or "we either of us promise to pay."[12]

Checks—Liability of drawer.

(2213) The court instructs the jury that, where all the parties reside in the same place, the presentation of a check drawn on a bank and received in the usual course of business, is deemed within a reasonable time if made during banking hours of the next day after it was so received; and it is the same whether the check be certified by the bank to be good or not, so far as the drawer of the check is concerned. If the jury, therefore, believe from the evidence in this case that the checks in evidence in this cause were taken by plaintiffs in the usual course of business, and were sent to the bank on which they were drawn during banking hours of the next day after they were received; and the said bank had before then, and has since, been closed, and had, and has, stopped business; then the court instructs the jury that such effort to present the checks is equivalent to a presentation of the checks, and is within reasonable time to charge the defendant upon the said checks.[13]

(2214) The court instructs the jury that, if they believe from the evidence in this cause that the plaintiffs received of the defendant on the afternoon of the —— day of ——, 19—, the two drafts or checks given in evidence, in order to take up two promissory notes of the defendant, of amounts corresponding with the respective amounts of said checks, and the plaintiffs then and there held said notes for an eastern bank for the mere purpose of collection, and, at the time of receiving said checks, plaintiffs delivered up to defendant his said notes, and on the same day remitted the

[12] Approved in Broadwell v. Sanderson, 29 Ill. App. 384.

[13] Approved in Rounds v. Smith, 42 Ill. 245.

amount thereof to the party from whom they received said notes; and if the jury further believe from the evidence that, immediately after the commencement of banking hours on the next day after receiving the said checks, and soon after ten o'clock A. M. of the ——— day of ———, 19—, the plaintiffs' teller took said checks to the banking office and usual place of business of the ———, named as drawee in said respective checks, for the purpose of presenting the same at said bank for payment, but was unable to obtain payment of said checks, or either of them, by reason that said bank was closed and had stopped payment, and that plaintiffs immediately and on the same day last aforesaid, gave the said defendant notice of the said matters and the non-payment by said bank of said checks; then the defendant is liable to the plaintiffs for the amount specified in said checks, and the jury will find for the plaintiffs accordingly, with interest on the amount at the rate of six per centum per annum after the ——— day of ———, 19— (the day of presentment).[14]

Drafts.

(2215) The court instructs the jury that, if you find from the evidence that the defendants agreed to accept only one draft, and no more; then you are instructed that, if you find from the evidence that the draft sued on was given for the cost of cattle which were consigned to the defendants, and that the defendants were notified of said draft by the holders thereof, and were asked to pay the same before receiving the cattle against which they were told it was drawn; and that, thereafter, the defendants received and sold the cattle against which they understood said draft was drawn, and received the proceeds of said cattle; then you will find the issues in this case for the plaintiff.[15]

[14] Approved in Rounds v. Smith, 42 Ill. 245.

[15] Approved in Hall v. First Nat. Bank of Emporia, 133 Ill. 234.

Accommodation notes.

(2216) The court instructs the jury that, under the pleadings and evidence, the defendant has admitted the execution of all the notes sued upon by plaintiff in this case, and has admitted that plaintiff is the legal owner and holder of said notes. It is, therefore, the duty of the jury to find for the plaintiff as to each or all of said notes, unless the jury believe from the evidence that some one or more of said notes was obtained by the bank as a matter of accommodation, as explained in other instructions.[16]

(2217) The court instructs the jury that if they find from the evidence that B. did, at the request of the officers in charge of the management of the ——— Bank, sign and deliver any of the notes in question in this case for an accommodation to the said bank, then as to such notes so signed by B., the plaintiff, cannot recover.[17]

(2218) The court instructs the jury that, if you believe that the makers of the note sued on were such accommodation makers, and that this was known to the cashier or president of the plaintiff's bank at and before the bank received said note; and if you also further believe from the evidence that at and before said note was delivered to plaintiff it had the shares of stock as claimed by ———, defendant, and at and before ———, defendant, signed said note plaintiff, through its cashier, agreed with ———, defendant, and the president of the ——— Company, for such company to hold such shares also as security for the note sued upon; and after so doing, if it was done, the ——— Company, by and through its president ———, made the instrument read in evidence to you dated —— day of ——, 19—, without the knowledge or consent of ———, defendant; and that afterwards E., acting under said agreement and being cashier of said bank possessing said shares of stock, sold or attempted

[16] Approved in Chicago Title & Trust Co. v. Brady, 165 Mo. 197.
[17] Approved in Chicago Title & Trust Co. v. Brady, 165 Mo. 197.

to sell under said writing dated —— day of ——, 19—; then, and in that event, you should find for the defendant, ———; but if you should not so find, then, as to this branch of the case, you will disregard said defense.[18]

Same—Liability where note retained by principal debtor.

(2219) The court instructs the jury that, if you find from the evidence that B. signed the notes sued upon in this case as an accommodation maker for the G. S. Bank, and delivered the notes to the bank, or one of its officers for the bank, he cannot be held liable thereon, no matter how the bank may have dealt with the notes, so long as it retained ownership and control thereof; and even though you find that the bank, after the notes were delivered to it, gave S. the benefit of the whole or a part of the benefit thereof, this fact would not render B., the defendant, liable on the notes. And, in this connection you are instructed that the possession of the receiver, is the possession of the bank.[19]

(2220) The court instructs the jury that, as between the party accommodated and the party accommodating, the latter can be under no liability to the former whatever by the relation in which they are placed upon the paper; and in this case, if you find from the evidence that B. was, in fact, an accommodation maker of the paper sued on, then he cannot be held liable, no matter in what form the transaction was put.[20]

Same—Qualified delivery.

(2221) The court instructs the jury that if this note was made out and signed by S., or S. and either of the next two defendants, and passed over to A. as a fully-executed note; and he thereupon delivered over the personal property which this note was given for to S., and he took possession of it; and

[18] Approved in Smith v. Traders' Nat. Bank, 74 Tex. 457.
[19] Approved in Chicago Title & Trust Co. v. Brady, 165 Mo. 197.
[20] Approved in Chicago Title & Trust Co. v. Brady, 165 Mo. 197.

then afterwards A. carried this note to H., and he signed his name to it; that signature was utterly void. It was without consideration, and it would be of no consequence; and your verdict should be for the defendant.[21]

(2222) The court instructs the jury that, if you find—to make it more specific—that when this note was drawn and signed by S. there was no understanding and agreement on the part of H. with the other defendants that he was to sign the note with them, and that the payee did not accept the note as signed, but merely took it into his possession temporarily in order to procure the other signers, and that he did not turn over this personal property to S. until after all the others had signed it, then your verdict should be for the plaintiff.[22]

Same—Diversion of note from its purpose to one having knowledge.

(2223) The court instructs the jury that where an accommodation note is diverted from the purpose for which it was given, one who takes it with knowledge cannot recover from the accommodation party; and in this case, the receiver possesses as a matter of law all the knowledge that the G. S. Bank possessed upon the subject of this note.[23]

Same—Burden of proof.

(2224) The court instructs the jury that the burden of proof is upon this defendant in this case, and unless the jury believe from the evidence that defendant has established, by a preponderance of the testimony, his allegation in the answer that said notes (or some of them) were given for the accommodation of said bank, (as explained in other instructions,) then your verdict should be for the plaintiff as to all of the notes sued upon in this case.[24]

[21] Approved in Steers v. Holmes, 79 Mich. 430.
[22] Approved in Steers v. Holmes, 79 Mich. 430.
[23] Approved in Chicago Title & Trust Co. v. Brady, 165 Mo. 197.
[24] Approved in Chicago Title & Trust Co. v. Brady, 165 Mo. 197.

Liability of indorser in general.

(2225) If the jury believe from the evidence that the defendant in this case placed his name on the back of the note here sued on, after the note transaction was completed, and the note had been delivered to plaintiff, then the jury are instructed, as matter of law, that a new consideration must be alleged and proved to support this action; and no evidence having been offered of any new consideration, the jury should find for the defendant.[25]

(2226) The court instructs the jury that, unless they find from the evidence that the name of the defendant was on the back of the note before it was delivered to plaintiff, then the liability of the defendant was a part of the consideration for the loan to ———, and the jury should find for the defendant, unless they shall find from the evidence that a new consideration passed from plaintiff to the defendant.[26]

(2227) The court instructs the jury that, if they believe from the evidence in this case that the defendant, at the time he indorsed his name on the back of the note offered in evidence, or during the time the plaintiff and defendant were negotiating about the same, or even after the defendant handed said note to the plaintiff and while they were yet negotiating about the same, that the defendant, W., agreed to pay said note if C., the maker of said note, did not, or words to that effect; then he is liable to pay said notes if C. did not, and it was not necessary for the plaintiff to notify the defendant of such non-payment; and the jury should find a verdict for the plaintiff and assess his damages at the amount due on said note.[27]

(2228) The court instructs the jury that, if they believe from the evidence in this case that the defendant, W., transferred the note offered in evidence, made by C. and payable

[25] Approved in Parkhurst v. Vail, 73 Ill. 343.
[26] Approved in Parkhurst v. Vail, 73 Ill. 343.
[27] Approved in Worden v. Salter, 90 Ill. 160.

to the defendant, W., by indorsing his name on the back of said note, and at the time he delivered it to plaintiff, agreed if C., the maker of said note, did not pay it he would; and if the jury believe said C. did not pay said note; then defendant would be liable to pay the same; and the jury should find a verdict for the plaintiff and assess his damages at the amount of principal and interest due on said note, unless the defendant has shown that plaintiff has been guilty of negligence, and that defendant has suffered loss thereby.[28]

Whether liability that of indorser or joint maker.

(2229) The court instructs the jury that, if they believe from the evidence in this case that ——— indorsed his name on the back of the note sued on in this case as indorser and not as joint maker thereof, and that at the time said note was delivered to the plaintiff he knew the said ——— indorsed the said note as an indorser thereon, and not as a joint promisor; and that the said plaintiff had said note regularly protested and had notice sent to the said ——— as indorser of such protest; then the jury may consider said facts along with the other evidence in the case, and that if therefrom they believe from the evidence that the said ——— was an indorser on the note sued on, and not a joint maker, or promisor, they should find for the defendant.[29]

(2230) The court instructs the jury that, the note being by these terms payable to ——— or bearer, would make it payable to any lawful holder without any indorsement by ———. No such indorsement would be necessary to enable such holder to collect it or maintain a suit thereon in his own name. He being named as payee in the note, therefore,

[28] Approved in Worden v. Salter, 90 Ill. 160.

This instruction was criticised on the ground that it omitted the element of a consideration for the alleged guaranty and it was held that the instruction should be construed in the light of the evidence, which showed a sufficient consideration.

[29] Approved in Roanoke Grocery & Milling Co. v. Watkins, 41 W. Va. 787.

offers no presumption that his signature at the bottom of the note was made as indorser, and not as maker.[30]

Blank indorsement.

(2231) The court instructs the jury that, if they shall believe from the evidence in the cause that defendants signed their names to the note sued on; and that plaintiff is in possession thereof, and that the same is endorsed by the ——— Company to plaintiff in blank; that is to say, that the name of the assignee is left out of the assignment thereon; then those facts constitute, in law, prima facie evidence that the holder thereof is the owner, and that it took the said note for value received before it became due and in the regular course of business; and the court instructs the jury that in that case they should find a verdict for plaintiff for the full amount of the note sued on and the interest thereon, unless they should further believe from the evidence in the case that the words "or bearer" were inserted in said note by the said ——— Company, or by plaintiff after the said note was executed and delivered to said company or its agents, or after it was assigned and delivered to plaintiff.[31]

Service of notice of dishonor—Failure cured by subsequent acknowledgment of liability.

(2232) The court instructs the jury that, even if the defendant was an indorser of the note, and not a maker, and if no notice of the nonpayment of the note was given him, at the time required to make him liable, if he subsequently, with knowledge of the fact that such notice had not been given, promised to pay or "fix it up," or any equivalent words, meaning thereby to arrange for its payment; this would be a waiver of the want of notice, and he would be liable as though the notice had been duly given.[32]

(2233) The court instructs the jury that, if they shall

[30] Approved in Cook v. Brown, 62 Mich. 473.

[31] Approved in Lewiston Sav. Bank v. Lawson, 87 Mo. App. 42.

[32] Approved in Cook v. Brown, 62 Mich. 473.

find from the evidence that the said notary did use reasonable diligence to ascertain the residence or place of business of the makers of said note as set out in its first instruction, but did not use reasonable diligence to ascertain the dwelling or place of business of the defendant; that then the notice deposited in the postoffice, as aforesaid, is not sufficient to hold the defendant, and the plaintiffs are not entitled to recover, unless the jury shall further find from the evidence that the notice so deposited in the postoffice, as aforesaid, did actually reach the defendant on that or the succeeding day; or unless they shall find from the evidence that subsequently to the day of the protest of said note, said defendant promised the plaintiffs or their attorney to pay the amount of said note, with a knowledge of the fact that notice of non-payment had not been regularly given to him.[33]

(2234) The court instructs the jury in this case that, if they shall find from the evidence that the promissory note offered in evidence was drawn by ——— & ———, co-partners, and that they were residents of the city of ——— at its maturity, and that said note was indorsed by the defendant, also a resident of the city at its maturity; and that upon the maturity of said note it was not paid, and that it was delivered by the cashier of the ——— Bank to ———, notary public, for protest; and that the said notary used reasonable diligence to ascertain the residence or place of business of the drawers of said note, and could not ascertain the same; and if they shall also further find from the evidence that the said notary did, also, use reasonable diligence to ascertain the residence or place of business of the defendant, the indorser, and could not ascertain the same; and that on the same day he addressed a written notice to the defendant informing him of a demand on the said drawers and of the non-payment of said note; and that said defendant was held responsible for the payment of the same, and directed said

[33] Approved in Staylor v. Ball, 24 Md. 183.

notice to the defendant and deposited the same in the ——— postoffice on the same day as set out in the protest offered in evidence; that, then, the plaintiffs are entitled to recover.[34]

(2235) The court further instructs the jury that, if they find from the evidence that the said notary did not use reasonable diligence to ascertain the residence or place of business of the makers of said note, if residents of the said city at its maturity; then no legal demand in this case has been made on the makers of said note, and the plaintiffs are not entitled to recover, unless they shall further find from the evidence that subsequently to the protest of said note, the defendant, the indorser, promised the plaintiffs or their attorney to pay the amount of said note, with a knowledge of the fact that no legal demand had been made on the drawers for payment.[35]

Burden of proof as to character in which note is signed.

(2236) The court instructs the jury that, it is claimed by the defendant that though the name of the defendant appears on the note in the place of a maker, it was understood and agreed that it was only to stand as indorser, and that only until the note became due. The burden of proving such an agreement is on the defendant, who sets it up, and to prove it by a preponderance of testimony. It is not enough that one party so understood and intended it. It must appear that both concurred in it and so agreed. To make a contract required the meeting of the two minds. Without this, it was no contract.[36]

Bona fide purchasers.

(2237) The court instructs the jury that, if you believe from all the evidence given in the case that the plaintiffs in this action bought this note in the usual course of business,

[34] Approved in Staylor v. Ball, 24 Md. 183.
[35] Approved in Staylor v. Ball, 24 Md. 183.
[36] Cook v. Brown, 62 Mich. 473.

before its maturity, from M. and C.; and that at the time they purchased the same they had no knowledge of such facts as put them on inquiry, and that they gave or parted with a valuable consideration for said note; then the plaintiffs are entitled to recover the amount of said note with interest thereon, according to its tenor, and reasonable attorney's fees.[37]

(2238) The court instructs the jury that inland bills of exchange and promissory notes, payable in a bank in this state, are governed by what is called the law merchant; that is to say, as applicable to the issues raised in this cause. If you believe from all the evidence in the case that the plaintiffs, in the usual course of business, purchased from M. & C. the note sued on for a valuable consideration before the maturity of said note, without any notice of any defense or equity existing against the same, and that at the time of their purchase they had no knowledge of such facts as put them upon inquiry; then they are entitled to recover, even though as between the defendant and the original payees of the note there existed equities in favor of the defendant.[38]

Same—Presumptions and burden of proof.

(2239) The court instructs the jury that in the absence of evidence, the holder of a promissory note indorsed by the person to whose order it is made payable is presumed to be a holder in good faith, and entitled to recover. Such presumption may be rebutted or overcome by evidence from which the jury believes either that the note was transferred by the payee after due, or that the party to whom it was transferred took it with notice of the defense thereto.[39]

(2240) The court instructs the jury that in order to defeat a recovery by the plaintiff bank, it is incumbent on the defendant ——— to establish by a preponderance of the evi-

[37] Approved in Warren v. Syfer, 23 Ind. App. 167.

[38] Approved in Warren v. Syfers, 23 Ind. App. 167. Held, not open to objection that it fails to state rules as to bona fide purchasers acting in good faith.

[39] Approved in Mahaska County State Bank v. Crist, 87 Iowa, 415.

dence, first, the truth of the defense which he has pleaded against the note in suit; and, second, the fact that the bank purchased the note with notice of such defense, or that it made such purchase after the note became due. If both these propositions have been so established, then plaintiff cannot recover; but, if either proposition has not been so established, then plaintiff will be entitled to your verdict for the full amount of the note in suit.[40]

Collateral security.

(2241) The court instructs the jury that if you find from the evidence that the plaintiff bank received the note in good faith and before it was due, as a collateral security for a loan made to ———, and that said loan is still unpaid, then plaintiff will be entitled to a verdict, that is, the holder of a note as collateral security for the payment of a loan made at the time the collateral security is deposited is to be treated as a purchaser, and if he receives such collateral in good faith, and before due, he holds it free from the defenses to which it would be liable in the hands of original holders to the same extent.[41]

(2242) The court instructs the jury that, where shares of stock in a corporation are pledged as collateral security for the payment of a debt, that the pledgee or person holding such stock has the right to surrender the certificate pledged and have other certificates for the same number of shares issued in his name, and where the pledgee is a bank, the certificate may be issued to and held by its cashier. If, therefore, you believe from the evidence that there was an agreement between the plaintiff and the defendants, or either of them, that such shares of stock should be held by the plaintiff as collateral for the payment of the note sued upon; and if you further believe that the same were by the plaintiff surrendered and other certificates issued to one ———, yet if you be-

[40] Approved in Mahaska County State Bank v. Crist, 87 Iowa, 415.
[41] Approved in Mahaska County State Bank v. Crist, 87 Iowa, 415.

lieve he intended thereby to hold such stock and did hold the same under said agreement, if any, then the change in the certificates so made would not be in law an alteration or change of the contract, and would be no defense to the makers of the note for which such security was held.[42]

Payment.

(2243) The court instructs the jury that the burden of proof is upon the defendant to prove, by evidence preponderating in his favor, that the money mentioned in the promissory note in suit has been paid to plaintiff. And the jury are instructed that the fact that F. did not present the check in question to the bank for payment until two or three days had elapsed after it was drawn, can not affect the plaintiff's right to recover, if the jury shall believe from the evidence that D., the drawer of the check, had not sufficient funds in bank to meet the check.[43]

Lost or destroyed notes.

(2244) The jury are instructed that in an action on a promissory note which is not produced, if the note is alleged to have been lost, and if the note was indorsed when it is alleged to have been lost, so that the note was actionable in the hands of any holder, then there can be no recovery on said note without proof of the note being lost or destroyed. So in this case, if you believe that the note in evidence was endorsed by the payee, then, the note not being produced, it must be shown to your satisfaction that the note is actually lost or destroyed before there can be any recovery on such note.[44]

Right of receiver to sue on note.

(2245) The court instructs the jury that this action is brought by the receiver, and he occupies the same position that the G. S. Bank would, had it brought the action in its

[42] Approved in Smith v. Traders' Nat. Bank, 74 Tex. 457.
[43] Heartt v. Rhodes, 66 Ill. 351.
[44] Approved in Heartt v. Rhodes, 66 Ill. 351.

own name before it was placed in the hands of a receiver. The receiver has no greater rights in this case than the G. S. Bank possessed. It does not occupy the position of purchaser for value.[45]

Plea of usury in action on note by purchaser.

(2246) The court instructs the jury that a note given wholly for usury is given on an unlawful consideration; and if the jury believe, from the evidence, that the note in question was given wholly for usury, then they should find for the defendant, if they also believe from the evidence that the defendant had notice before he purchased the same that it was given wholly for usury.[46]

(2247) The court instructs the jury that, if they believe from the evidence that the only consideration of the note sued upon in this action was for illegal interest, then the jury should find for the defendant, provided they also believe from the evidence that the said defendant bought said note after it became due, or had notice that it was given wholly for illegal interest.[47]

Prima facie case made by introduction of notes.

(2248) The court instructs the jury that the notes themselves make a prima facie case, and entitle the plaintiff to recover, unless the evidence shows they were given without any valid consideration.[48]

(2249) The court instructs the jury that, the note being fair on its face, makes a prima facie case in favor of the plaintiff. To overcome this, or to make out a defense the burden of proof is on the defendant. In any disputed question of fact as to anything which is necessary to make out the defense, the jury should not find the defense established,

[45] Approved in Chicago Title & Trust Co. v. Brady, 165 Mo. 197.

[46] Harvey v. Ellithorpe, 26 Ill. 418.

[47] Harvey v. Ellithorpe, 26 Ill. 418.

[48] Heimann v. Hainz, 65 Ill. App. 316.

unless they are satisfied by a preponderance of evidence that the fact is as claimed by the defendant.[49]

Parol evidence to show agreement as to liability.

(2250) The court instructs the jury that it is not competent for the defendant to show by parol or verbal testimony, as against the terms of the written instrument, that the agreement or understanding of the parties was that his liability should be that of an indorser only, nor that he was to be an indorser or liable as such only until the note should become due, and no longer; and all such testimony must be disregarded by the jury.[50]

Form of verdict.

(2251) The court instructs the jury that the plaintiff has sued upon six different notes, each of which constitutes a separate and distinct claim or cause of action in plaintiff's petition. Those claims are called "counts" in the instructions to you by the court. Your verdict should state your finding or decision as to each count or cause of action separately. And if your finding is for the plaintiff, as to any one or more counts, you should also state in your verdict the exact amount which you find from the evidence to be still due and unpaid at the present time (including principal and interest to date) on each particular note mentioned in the count or counts of the petition on which you may so decide to find for plaintiff.[51]

[49] Approved in Cook v. Brown, 62 Mich. 473.

[50] Approved in Cook v. Brown, 62 Mich. 473.

[51] Approved in Chicago Title & Trust Co. v. Brady, 165 Mo. 197.

CHAPTER XCIX.

NUISANCE.

Obstruction of water course by dam, 2252-2255.
Same—Liability—Where others contribute to nuisance, 2256, 2257.
Necessity of showing injury to health and habitation, 2258.
Necessity that public be affected injuriously, 2259.
Abatement at instance of one buying neighboring property with knowledge, 2260.
Lead works and shot tower as nuisance in a manufacturing city, 2261, 2262.
Proof of fact of nuisance, 2263-2265.
Burden of proof, 2266.

Obstruction of water course by dam.

(2252) The court instructs the jury that, if the dam either directly causes or increases the inundation of the sand, mud and stagnant water which produces the malaria, or the water would, if unobstructed, carry off the sand, and the dam so obstructs as to prevent its doing so, the defendants would be guilty. The law will not undertake to apportion the liability for a public wrong. The question for the jury to decide, applying principles of law, is, "Does the dam and pond produce the nuisance?" If so, defendants are guilty; otherwise they should be acquitted.[1]

(2253) The court instructs the jury that the defendants insist, further, that the dam is not the cause of the accumulation of the sand and mud in the creek and the water in the low grounds, because the creek has not sufficient fall to convey away of its own force the sand which, from natural causes and the cultivation of the land, come into it. In respect to this phase of the case, if you find from the testimony that the stagnant water, sand and mud which produce the malaria, is caused by the natural formation of the bed of the

[1] Approved in State v. Holman, 104 N. C. 861.

creek, and not by the dam, nor contributed to by the dam, the malaria and sickness consequent thereupon would be attributed to such natural formation, and not to the dam.[2]

(2254) The court instructs the jury that the erection of the dam is not in itself wrongful, nor is the mill-pond in itself a nuisance; if, however, by reason of natural causes, such as decaying vegetation which has grown or been brought into the pond by the stream or its natural tributaries, or changes in the topography of the land adjacent to the creek from the operation of natural laws, the pond produces, or contributes to the production of malaria or noxious, unhealthy odors, to that extent which injures the health or comfort of the community in general, it would thereby become a nuisance, and the defendants indictable for maintaining it.[3]

(2255) The court instructs the jury that, if the evidence should satisfy the jury that the whole community had been injuriously affected, yet defendants would not be guilty unless it was further found from the evidence that such injury was produced, directly and proximately, by defendants' dam and pond, and by no other cause.[4]

Same—Liability—Where others contribute to nuisance.

(2256) The court instructs the jury that if, however, other persons, not under the control of the defendants, plow or bring into the pond or the lands adjacent thereto, substances which decay and produce malaria; or if such persons cut ditches into the stream above the pond, thereby bringing sand and mud into the creek; or, if having cut such ditches, failed to keep them open, permitting them to become choked and filled up, thereby causing malaria; such result would be attributed to such persons and agencies and not to the pond, and defendants should be acquitted.[5]

[2] Approved in State v. Holman, 104 N. C. 861.
[3] Approved in State v. Holman, 104 N. C. 861.
[4] Approved in State v. Holman, 104 N. C. 861.
[5] Approved in State v. Holman, 104 N. C. 861.

(2257) The court instructs the jury that the defendants are liable only for such results as flow directly, naturally and proximately from the pond and dam. Therefore, if you find that the pond and dam are the cause of the nuisance, you should convict the defendants; but if other causes or agencies to which the defendants have not contributed, and which did not arise from their agency, so affected the pond and dam as to produce the cause of the sickness, then such sickness would be attributed by law to such agencies, and not to the pond or dam, and you should acquit the defendants.[6]

Necessity of showing injury to health and habitation.

(2258) The court instructs the jury that the defendants are entitled to use their property for any lawful business, though it may be in a slight degree inconvenient or unpleasant to the owners of the adjoining property, and to entitle the adjoining owners to suppress such works, they must show that such business is injurious to life or health, or emits such noisome smells as would render the plaintiff's property unfit for occupation.[7]

Necessity that public be affected injuriously.

(2259) The court instructs the jury that to make the defendants' mill-dam and pond a public nuisance, and the defendants indictable for maintaining the same, it must injuriously affect the public, that is, it must affect the whole community. The fact that it injuriously affects individuals or families in a community, is not sufficient to make defendants guilty. They should be acquitted, unless the jury are satisfied the whole community is so injuriously affected—not every family or person in the community, but the community generally.[8]

[6] Approved in State v. Holman, 104 N. C. 861.
[7] Approved in Price v. Grantz, 118 Pa. St. 402.
[8] Approved in State v. Holman, 104 N. C. 861.

Abatement at instance of one buying neighboring property with knowledge.

(2260) The court instructs the jury that, if they find that at the time the plaintiff acquired the property mentioned in the evidence and erected thereon the improvements mentioned in the evidence, there was already erected and in operation on the adjacent lot a fertilizer factory which would use the same agents and from which were emitted the like gases and emanations that were used in and emanated from the factory of the defendant and producing like effects; and that said factory afterwards passed into the possession of, and was operated by, the defendant, as it had been operated before; and if they shall further find that when plaintiff acquired and improved his said property and prior thereto, there was established and operated in the same locality factories similar to that of the defendant, from which like emanations producing like results, proceeded; and that said factories employed large numbers of men and produced merchandise of great value; and that plaintiff was aware of the existence of said factories and that he so acquired and improved his said property; and if they shall further find that the factory of defendant was in a suitable and proper place, with a view to the convenience, welfare and comfort of the public; and if they shall further find that the damage and injury suffered by the plaintiff were only such as are incident to the proximity of such a business as that of the defendant in that locality, and were not unreasonable or excessive in view of the location and all of the circumstances of the case; then plaintiff is not entitled to recover in this action.[9]

Lead works and shot tower as nuisance in a manufacturing city.

(2261) The court instructs the jury that, if a person lives in a city like P., he or she of necessity submits him-

[9] Approved in Susquehanna Fertilizer Co. of Baltimore City v. Malone, 73 Md. 268.

self or herself to the consequences and obligations of trades which may be carried on in his immediate neighborhood; and if the jury believe that the shot-tower and leadworks are carried on without injury to life or health, and without noisome smells, the plaintiff cannot recover.[10]

(2262) The court instructs the jury that in determining this case, the jury should remember that the plaintiff does not claim that either the leadworks or the shot-tower was run by defendants in a negligent manner; and should the jury think that the said works, run in an ordinarily careful and skillful manner, would not be a nuisance, either public or private, the plaintiff could not recover, even though the jury should also think that, by some carelessness or negligence of defendants' employees at the time of the fire, or at some other time, the plaintiff or his family were hurt.[11]

Proof of fact of nuisance.

(2263) The court instructs the jury that the plaintiff cannot recover, unless the jury should be satisfied from the evidence that the leadworks or shot-tower, as conducted by the defendants, was either a common or private nuisance.[12]

(2264) The court instructs the jury that the mere fact that the plaintiff's wife, or himself, or his children, suffered from lead or arsenical poisoning, is not sufficient to enable the plaintiff to recover; but the plaintiff must prove that such poisoning was caused by the operation of either the shot-tower or the leadworks, by the defendants.[13]

(2265) The court instructs the jury that the effect of a peculiar and very exceptional idiosyncrasy or susceptibility on the part of a person, by which he or she may be affected by a slight trace of arsenic or lead, which would not in any degree affect other persons, would not be such an injury as

[10] Approved in Price v. Grantz, 118 Pa. St. 402.
[11] Approved in Price v. Grantz, 118 Pa. St. 402.
[12] Approved in Price v. Grantz, 118 Pa. St. 402.
[13] Approved in Price v. Grantz, 118 Pa. St. 402.

would, of itself, condemn the source of such effect as a nuisance.[14]

Burden of proof.

(2266) The court instructs the jury that the burden of proof is upon the plaintiff to show, (1), that the defendants were guilty of maintaining a private nuisance in the operating of the shot-tower or leadworks; and, (2), that as a result from such operation he, the plaintiff, suffered injury; and a failure on the plaintiff's part to prove both of such propositions to the satisfaction of the jury, would prevent a recovery.[15]

CHAPTER C.

PARENT AND CHILD.

Liability for necessaries furnished child, 2267.
Liability of parent for medical services rendered to child, 2268.
Liability of master to parent of minor servant, 2269, 2270.
Recovery for services rendered parent, 2271.
Same—Presumption that services were gratuitously rendered, 2273.
Same—Proof of agreement to pay for services, 2274.
Same—Amount of recovery, 2275.
Compensation to mother for care of child, 2276.

Liability for necessaries furnished child.

(2267) The court instructs the jury that, if they believe from the evidence that defendant's son had purchased goods from the plaintiff for several years, and that they had been charged to the defendant, the father; and that on occasions previous to the one in question the defendant without objection paid for goods so purchased; then the jury may infer authority on the part of the son to purchase the goods alleged in the declaration to have been purchased from the plaintiff

[14] Approved in Price v. Grantz, 118 Pa. St. 402.
[15] Approved in Price v. Grantz, 118 Pa. St. 402.

by the defendant's son, and may render a verdict against the defendant for the goods so purchased, if they were necessaries.[1]

Liability of parent for medical services rendered to child.

(2268) The court instructs the jury that the law does not require that there should be an express promise by a father to pay for medical services rendered to his child, in order that he should be liable therefor; but that if such services are necessary for the child, and are rendered under circumstances sufficient to raise an implied promise to pay for such services, the jury may find the father liable for the services so rendered; and if the jury believe from the evidence in this case that the plaintiff rendered medical services to the child of the defendant, and that the services so rendered were necessary for the child; and if the jury further believe from the evidence that the child's mother was living apart from defendant, but with the defendant's permission; the jury will be justified in finding the existence of an implied promise on the part of the defendant to pay for the services.[2]

Liability of master to parent of minor servant.

(2269) The court instructs the jury that when a person or corporation employs a minor, it devolves on such employer to obtain the consent of the father, when such minor is under the control of the father, and whilst said minor forms a part of the father's family. Whilst a minor, the father is liable for the support of his child, and is entitled to the earnings of his son. And where the son, through the negligence of the employer or its servants, receives an injury incapacitating him for a while from labor, and rendering him less serviceable up to his arrival at the age of twenty-one years, the employer thus engaging a minor,

[1] Murphy v. H. S. & H. W. Ottenheimer, 84 Ill. 39.
[2] McMillen v. Lee, 78 Ill. 443.

without the knowledge or consent of his father, is liable to the father in damages.[3]

(2270) The court instructs the jury that under the law the father is entitled to the services of his minor children during their minority. Minors cannot, without their father's consent, make legal contracts; nor without such consent, either before or by acquiescence after knowledge of the father, engage in business for themselves. If you believe from the evidence that ——— was a minor, under twenty-one years of age; that, without the knowledge or consent of his father, he engaged himself to defendant, and whilst so engaged received the injury alleged; then, if such injury was not caused by said ———'s own negligence, plaintiff is entitled to recover for the loss of his son's services whilst under medical treatment, to his necessary expenses in perfecting a cure, including medicines and extras required in effecting a cure; also to all reasonable medical bills for which the father is liable, and to such damages as result and flow directly from the injury—such as the diminished value of services up to the arrival at the age of majority of said minor.[4]

Recovery for services rendered parent.

(2271) The court instructs the jury that, if you should find in this cause that the plaintiff is the daughter of the defendant; and that she, at or about the time alleged in the complaint, went to live with her father, under an agreement and understanding that she should live with her father as a member of his family; and for her services she should have her board and lodging and also that of her child, and that she should have, in addition, what she could make out of surplus eggs, butter, and other truck raised on the farm and no other compensation; and that plaintiff went on under such an agreement and performed the services alleged in

[3] Approved in H. & G. N. R. Co. v. Miller, 49 Tex. 322.

[4] Approved in H. & G. N. R. Co. v. Miller, 49 Tex. 322.

the complaint, receiving the surplus eggs and butter and other truck or the proceeds thereof; then, and in that case, the plaintiff could not recover.[5]

(2272) The court, at the instance of defendant, instructs the jury that, if plaintiff resided with her father after becoming of age, and was treated as a member of his family, then the jury must be satisfied from the evidence that at the time when the services were rendered, it was expected by both parties that she should be paid for such services, or that the circumstances under which the services were performed were such, that such expectation was reasonable and natural; that if she lived with her father when such services were performed, as his other children did, it is incumbent on the plaintiff to prove an express hiring, or circumstances from which an express hiring may reasonably be inferred, besides the mere fact of performing the services; that the law, while the relation of parent and child exists, raises no implied contract to pay for such services.[6]

Same—Presumption that services were gratuitously rendered.

(2273) The court instructs the jury that it is a presumption of law that a father is not bound to pay a daughter, though of age, for work done by her while living at home and as a member of the family; but this presumption may be overcome by proof of an agreement or understanding for compensation, and such understanding may be inferred from the circumstances shown in evidence, if the jury deem the inference warranted.[7]

Same—Proof of agreement to pay for services.

(2274) The court instructs the jury that, if the father at the time his daughter—after arriving at majority—was working for him knew that his daughter was expecting pay-

[5] Approved in Story v. Story, 1 Ind. App. 284.
[6] Approved in Miller v. Miller, 16 Ill. 296.
[7] Approved in Story v. Story, 1 Ind. App. 284.

ment for the work so done, and allowed her to continue to work in the belief, without notice that he did not intend to pay, he would be bound to pay. And in this case it is a question of fact for you, in the light of all the facts and circumstances in proof, to say whether there was any understanding or agreement between the parties.[8]

Same—Amount of recovery.

(2275) The court instructs the jury that, if there was an understanding between the parties that the work should be paid for, and no agreement as to the amount, you should allow such sum as, under the evidence, is shown to have been the ordinary and reasonable compensation for such work.[9]

Compensation to mother for care of child.

(2276) The court instructs the jury that no promise on the part of the father to pay a mother for anything she may do in the discharge of her moral duties to their off-spring can be implied. The mother is as much morally bound to care for, support, nourish, and educate the child as the father; and the law will not allow her to recover for so doing, simply because the father omits his duty.[10]

CHAPTER CI.

PARTNERSHIP.

Partnership as to third persons, 2277-2280.
Liability of retiring partner for debts of firm, 2281-2284.
Recovery of firm indebtedness by member of firm, 2285.
Effect of acts of partner after dissolution of firm, 2286.
Firm debts, 2287.
Liability of firm for tort of partner, 2288, 2289.
Replevin by one partner against another, 2290, 2291.

Partnership as to third persons.

(2277) The court instructs the jury that, if a person holds

[8] Approved in Story v. Story, 1 Ind. App. 284.
[9] Approved in Story v. Story, 1 Ind. App. 284.
[10] Approved in Lapworth v. Leach, 79 Mich. 16.

himself out as a partner of another by his acts, and a third person deals with that other person on the faith of the existing partnership, the first may be held liable to the creditor, notwithstanding there was, in fact, no partnership.[1]

(2278) The court instructs the jury that a partnership may engage in a transaction outside of its regular business, if all the partners agree thereto; and if they so engage in other transactions, the acts of one partner, done in respect to such transactions, will bind the firm; and, if you believe from the evidence that said ——— and ——— were partners, and that the purpose of the partnership was to buy and sell cattle; yet, if you believe from the evidence that said ——— authorized said ——— to sign the firm name to this bond sued on, agreeing to the signing of the same, he would be bound by the acts of said ———.[2]

(2279) The court instructs the jury that a partnership can only exist as between the parties themselves, in pursuance of an agreement to which the minds of all have assented; but that, when created, each partner has full power and authority to bind all the partners by his acts or contracts in relation to the business of the partnership. And as between the firm and third persons dealing with them in good faith, it is of no consequence whether the partner is acting in good faith with his copartners or not, provided the act done is within the scope of partnership business, and professedly for the firm; but the relation of the partnership confers no authority on one party to bind the others, except as to transactions within the scope of the partnership business. And if you believe that said ——— and ——— were partners; yet, if you believe that the partnership existing between them was entered into for the sole purpose of buying and selling cattle; then such partnership relation

[1] Smith v. Knight, 71 Ill. 148.

[2] Fore v. Hitson, 70 Tex. 517.

could not authorize either party to sign the firm name as sureties on the bond of a third party. And if you find that the bond sued on was signed by ——— without the consent of said ———, and without other authority from him; then you should find in favor of said ———, (non-consenting partner,) unless you should further find that said ———, after being informed that the bond was so signed by ———, consented to the same.[3]

(2280) The court instructs the jury that if you believe from the evidence that, prior and up to the time of the execution of the bond sued on, the said ——— had voluntarily and knowingly held said ——— out to the world as authorized to sign contracts similar to the one in question; and had knowingly so conducted themselves to reasonably justify the public generally, and those dealing with them, in believing that said ——— was authorized to sign their firm name to such contracts; and that the plaintiffs accepted said bond, believing that said ——— had authority to sign the same; then said defendants would be bound by the acts of said ———.[4]

Liability of retiring partner for debts of firm.

(2281) The court instructs the jury that, if they believe from the evidence that defendant withdrew from the firm of ———, in ———, actually and in good faith, and that he did what was usual and proper to give notice to the plaintiffs of his withdrawal from the firm of ——— before the accounts sued on in this case were contracted; (the usual and proper way of giving notice of the retirement of a member of a firm from the firm being by advertising the dissolution of the firm in some newspaper;) and if the jury believe from the evidence that the defendant advertised the fact of his withdrawal from the firm; then the jury are

[3] Approved in Fore v. Hitson, 70 Tex. 517.

[4] Approved in Fore v. Hitson, 70 Tex. 517.

instructed to find the defendant not liable in this suit under the evidence in the case, although plaintiffs had no actual notice of defendant's withdrawal. And if the jury find from the evidence that the plaintiffs, or any one of their authorized agents had actual notice of the defendant's withdrawal from the firm of ——— prior to the time when the accounts sued on were created, then they must find for the defendant. Under the proof in this case, the jury alone can determine the question of agency; and if they find from the evidence that any authorized agent of the plaintiffs, in their mercantile business, had notice of the defendant's withdrawal from the said firm prior to the time when the accounts sued on were created, then the plaintiffs cannot recover in this suit; and if the jury find from the evidence that the plaintiffs had notice in any way that the defendant was not a member of said firm at the time the accounts sued on were created, then they must find for the defendant.[5]

(2282) The court instructs the jury that where a member of a partnership withdraws,—if he fails to give notice of the fact,—his liability continues, unless he can bring home notice to the person seeking to hold him liable; and that one retiring from a firm can terminate all future liability for its business by giving notice to those who have been accustomed to deal with the firm; and as to all others by publishing a notice of the dissolution of the firm in the public newspapers of the neighborhood; or the retiring partner may escape liability by proving that persons, dealing with the firm after his retirement, had actual notice of his withdrawal.[6]

(2283) The court instructs the jury that where a change takes place in a firm, by some members retiring, and where the same firm name is still used, such retiring members can only relieve themselves from liability by giving actual no-

[5] Stewart & Co. v. Sonneborn, 49 Ala. 178.
[6] Ellis' Adm'rs v. Bronson, 40 Ill. 455.

tice of their retirement to persons accustomed to deal with the firm and who may thereafter continue to deal with the firm.[7]

(2284) The court instructs the jury that, if they find from the evidence that prior to and at the date of the execution of the note in question, the defendant, ———, was a member of the firm of ———, composed of himself and ———, and was the active or managing partner therein; that he indorsed the note in evidence with the firm name; that he sent the two telegrams dated ———, offered in evidence by the plaintiff; and that by reason of the same, plaintiff paid said note for account of said firm, and on the credit of said firm; and shall further find that at the time of said payment, plaintiff had no notice of the dissolution of said firm; then the plaintiff is entitled to recover.[8]

Recovery of firm indebtedness by member of firm.

(2285) The court instructs the jury that, if you find that any item charged in the plaintiff's claim herein is the same or any part of any transaction had between the decedent and any firm of which plaintiff was a partner, and that such transaction was a part of the firm business, the plaintiff cannot recover for the same in this action.[9]

Effect of acts of partner after dissolution of firm.

(2286) The court instructs the jury that, at the dissolution of a partnership the members thereof cannot create obligations which will bind the firm, or change the character or form of those already existing, but it devolves upon them to give actual notice to those with whom such firm has been dealing; and any act done within the scope of the partnership by one of the members, after its dissolution and

[7] Holtgreve v. Wintker, 85 Ill. 470.

[8] Approved in Seldner v. Mount Jackson Nat. Bank, 66 Md. 488.

[9] Approved in Shirts v. Booker, 21 Ind. App. 420.

before actual notice to those with whom such firm has been dealing, is binding upon all the members of such firm.[10]

Firm debts.

(2287) The court instructs the jury that the plaintiff, to recover, must satisfy you that this money was procured and advanced for the benefit of the firm of ——— & Co. It would not be sufficient if plaintiff simply put it in as a part of his capital which it was his duty to put into the firm, or if it was advanced by plaintiff as money due from him to the firm which he had previously drawn out. If it was used in that way, it would not create a firm liability. But the plaintiff must prove, in order to recover, that this money was procured by him for the benefit of the firm and advanced to the firm, (money which was not due or owing from him to the firm,) but money which he advanced to the firm and of which the firm had the benefit. If he has satisfied you of that,—then he is entitled to recover for the amount of the notes; and upon this question,—which is the vital question at issue,—your determination will decide the case. You will consider the direct testimony of the witnesses and determine what degree of credit to give it. You will examine the books and papers so far as they seem to you to throw light upon the case, and you will consider the probabilities and the circumstances of the parties, and see to which result your minds, after a review of the whole, incline.[11]

Liability of firm for tort of partner.

(2288) The court instructs the jury that fraud committed by one partner in the course of partnership business binds the firm, even though the other partners have no knowledge of, or did not, participate in the fraud; and an action will lie against the firm in respect to such fraud.[12]

[10] Approved in Davis v. Willis, 47 Tex. 154.
[11] Approved in Duran v. Ayer, 67 Me. 145.
[12] Schwabacker v. Riddle, 84 Ill. 517.

(2289) The court instructs the jury that if a partner commit a tort, not as partner, but as individual, in respect to a matter entirely foreign to the business of the partnership, such tort does not bind the firm or the co-partners of the one committing the tort, simply because the co-partners may, at the time of the commission of the tort, happen to sustain partnership relations to the wrongdoer; and if the jury believe from the evidence that the plaintiff was induced by the false representations of A., one of the defendant partners in this suit, to purchase an interest of A. in the firm, as alleged in the declaration; then the jury are instructed that such false representations—if the jury find that they were made—were not in the course of the partnership business; and if the jury believe from the evidence that the partners of A. did not actually participate in the fraud, and had no knowledge of the alleged fraud of A., then the jury are instructed that defendants are not responsible for the alleged fraud of A., (in and about the selling of the interest of A.) in the partnership to the plaintiff.[13]

Replevin by one partner against another.

(2290) The court instructs the jury that, if they believe from the evidence that, at the time the property replevied in this case was replevied, it was owned by both the plaintiff and defendant as partnership property, the jury will find the issues for the defendant.[14]

(2291) The court further instructs the jury, on behalf of the defendant, that, in determining upon their verdict in this case, they should take into consideration all the facts and circumstances in evidence before them; and if, after full consideration of all such facts and circumstances, the jury are of the opinion from the same that the defendant did pur-

[13] Schwabacker v. Riddle, 84 Ill. 517.

[14] Approved in Reynolds v. McCormick, 62 Ill. 412.

The defendant claimed to have purchased a half interest in the property replevied from plaintiff, while they were in partnership.

chase one-half interest in the property replevied in this suit, as testified to by him; then the jury should find the issues for the defendant.[15]

CHAPTER CII.

PAUPERS.

Action to recover for supplies furnished, 2292.

Action to recover for supplies furnished.

(2292) The court instructs the jury that, as the plaintiffs' own testimony showed that the alleged paupers had had their home in ——— since —— day of ——, 19—, the burden of proof was on the plaintiffs to show that before the lapse of five years from that time they had become destitute and in need of relief, and had received necessary supplies as paupers, otherwise their settlement would be in ———; that, if the plaintiffs had satisfied the jury of these facts, and that such supplies were furnished and received, the presumption was,—in the absence of evidence to the contrary,—that the transaction was in good faith; and that, if the defendants claimed that there was bad faith on the part of the overseers of ———, and that the supplies were furnished collusively and by the contrivance of the overseers, to prevent their gaining a settlement in ———, the burden of proof was upon them (the defendants) to show it.[1]

[15] Approved in Reynolds v. McCormick, 62 Ill. 412.

Defendant claimed to have purchased a half interest in the property replevied from plaintiff while they were in partnership.

[1] Inhabitants of New Portland v. Inhabitants of Kingfield, 55 Me. 172.

CHAPTER CIII.

PAYMENT.

Application of payments, 2293.
Burden of proof of application, 2294.
Recovery back of payment, 2295.

Application of payments.

(2293) The court instructs the jury (for the plaintiffs) that, in deciding whether payments made by defendants to plaintiffs were made on the ties or on the construction contract, the jury will take into consideration all the evidence in regard to the payments,—how they were to be applied, what they were talking about when the payments were made, and in this manner arrive at the intention of the parties paying and receiving the money.[1]

Burden of proof of application.

(2294) The court instructs the jury that where the plaintiff proves, by a preponderance of the evidence, that certain sums of money have been paid to the defendant, and the defendant claims that said payment was made upon some other demand or account, which he claims he then held against plaintiff, the burden of proof is on the defendant to show by a preponderance of evidence that there then was a subsisting and unpaid debt due defendant from plaintiff upon which such payment was applied.[2]

Recovery back of payment.

(2295) The court instructs the jury that the rule in this class of cases is, that where a payment of money is made upon an illegal or unjust demand, when the party is advised of all the facts, it can only be considered involuntary when it is made to procure the release of the person or

[1] Approved in Snell v. Cottingham, 72 Ill. 124.
[2] Approved in Prall v. Underwood, 79 Ill. App. 451.

property of the party from detention, or when the other party is armed with apparent authority to seize upon either, and the payment is made to prevent it. But where the person making the payment can only be reached by a proceeding at law, he is bound to make his defense in the first instance, and he cannot postpone the litigation, by paying the demand in silence and afterwards suing to recover it back.[3]

CHAPTER CIV.

PHYSICIANS AND SURGEONS.

Degree of skill required, 2296-2302.
When relation ceases, 2303.
Proximate and remote cause, 2304-2307.
Effect of incorrect diagnosis and treatment, 2308, 2309.
Contributory negligence, 2310-2312.
Proof of charge, 2313-2320.
Presumptions from failure to effect cure, 2321.
X ray photographs, 2322, 2323.

Degree of skill required.

(2296) The jury are instructed that one who holds himself out to the world as a physician and surgeon, impliedly contracts that he possesses the skill to properly practice his specialty. He is bound, therefore, in the discharge of his duties, to use ordinary care, diligence and skill, according to the circumstances of the case.[1]

(2297) In judging of the proper degree of skill in any given case, regard is to be had to the advanced state of the profession at the time. The defendant's skill, diligence and learning are to be measured with that which good physicians and surgeons of ordinary ability and skill, practicing in similar localities, ordinarily possess; and if you find from the evidence that this defendant, in the treatment of the

[3] Approved in Lieber v. Weiden, 17 Neb. 584.
[1] Kendall v. Brown, 86 Ill. 337.

plaintiff, omitted making such a proper and sufficient examination as to properly enable him to diagnose the plaintiff's case, and that by such omission he improperly diagnosed said case, and failed to find the real cause of the plaintiff's ailment; and instead of prescribing the proper mode of treatment therefor, he pursued what has proved injurious.

(2298) If the jury believe from the evidence that the defendant was properly treating the plaintiff for what he, the defendant, believed to be plaintiff's ailment, yet through want of ordinary skill and care in examining the plaintiff's injury, failed to detect the real ailment or nature of the injury, and in consequence thereof such treatment and advice resulted in injury to the plaintiff; the defendant is liable in damages.

(2299) A physician may be called to prescribe for cases which originated and are brought on, or aggravated, by the failure of the patient to sooner seek medical attention; and even though such failure to sooner seek medical attention might remotely contribute to the injury sued for; yet, it would not relieve the physician from liability for his distinct negligence and any injury caused thereby, provided such distinct negligence on the part of the defendant was the cause of, or contributed to the injury, and that plaintiff would have recovered partially or entirely through proper treatment and care on the part of the defendant.

(2300) You are instructed that, if you believe from the testimony that the injury sustained by plaintiff was one which under all the circumstances would have been benefited by ordinary surgical skill and care, and the surgeon failed in his duty in this respect, the damages ought to be commensurate with the injury; and though you believe from the evidence that the injured limb was not susceptible of a more perfect restoration, the surgeon would, nevertheless, be liable for any unnecessary pain or delay occasioned by the giving of improper instructions or advice to the plain-

tiff; providing you believe from the evidence that such improper instructions and advice were given and such unnecessary pain or delay was caused by such improper instructions and advice.

(2301) The court instructs the jury that, under the employment alleged by plaintiff to have been made of the defendant, (and concerning which testimony has been given in this case,) the defendant in his examination, diagnosis and treatment of the plaintiff was not liable for an error of judgment,—provided he used ordinary care and skill,—but was only required to give the plaintiff the benefit of his best judgment.

(2302) The court instructs the jury that, if among educated surgeons of ordinary skill and information, two methods of treatment are recognized as proper, it is not negligence for the defendant to adopt either; and the fact that some other method existed, or some other surgeon testifies in this case that he might or would have used or advised the other or different method, does not even tend to establish negligence or improper examination or treatment on the part of the defendant; nor would it be an act of negligence or impropriety for the defendant not to have adopted such method, so testified to by such other surgeon.

When relation ceases.

(2303) The court instructs you that the duty of the physician to his patient does not end until the physician has been discharged by a patient, or the physician has discharged a patient, or has notified the patient of his intention to withdraw from the case, thus enabling the patient to employ other medical aid; and if you believe from the evidence that the defendant was dismissed with the plaintiff's assent, or that the defendant instructed the plaintiff to return to his office for further instruction and advice, the plaintiff cannot hold the defendant responsible for any subsequent results to the injured hip; but if you believe from the evidence that

the defendant told the plaintiff that he had done all that he could do for him, and not to return to his office; and if you believe that the plaintiff relied on such direction and instruction; then the defendant did not end his responsibility for the case by withdrawing from it as he did, and the plaintiff was not guilty of negligence in following such advice or opinion, even if by so doing you may believe from the evidence the said injury was increased or recovery retarded; and even if you believe that the plaintiff consented to such discharge, nevertheless, if such direction and instructions of the defendant were improper, the consent of the plaintiff did not discharge the defendant; and the defendant in such case would be responsible for injury that occurred after such discharge.

Proximate and remote cause.

(2304) The court instructs the jury that if they should find from the evidence submitted in this case that the condition and results complained of by plaintiff—and for which in this cause he seeks to recover damages against the defendant —might be due to one of several causes for which it appears from the testimony the defendant was in no wise responsible, such as inflammation of the joint, (hip-joint disease,) caused by the fall or by the physical or constitutional condition of the plaintiff; then the verdict must be for the defendant.

(2305) If, from the testimony, it appears to the jury that the things complained of by the plaintiff against the defendant in this cause might be ascribed to one or the other of several causes, as inflammation by disease, etc., resulting from the fall alleged to have been sustained by the plaintiff, so that the results now detailed in evidence are compatible with the view that the same were not, and are not, due to any alleged negligence on the part of the defendant; then it is the duty of the jury to return a verdict for the defendant.

(2306) Although the jury should find from a preponder-

ance of the evidence submitted in the case,—under the instructions herein given,—that the defendant was negligent in the examination or alleged treatment of the plaintiff; nevertheless, the verdict of the jury must be for the defendant, unless it is further established by a preponderance of the testimony that the result complained of by plaintiff is due to the alleged negligence in examination and treatment of the defendant, or that the injuries sustained by the plaintiff are greater than would, under the evidence of the experts submitted in this case, have occurred, if there had been proper examination, diagnosis and treatment by the defendant.

(2307) The court instructs the jury that before they can find for the plaintiff, they must find from the evidence, not only that the defendant was guilty of the negligence complained of by the plaintiff, but that such negligence was the proximate cause of the injury complained of; and this court instructs the jury that a proximate cause is that cause which in nature and continuous sequence, unbroken by any efficient intervening cause, produced the result complained of, and without which that result would not have occurred.

Effect of incorrect diagnosis and treatment.

(2308) The court instructs the jury that it was the duty of the defendant, when first called in to examine the plaintiff's injury, to make an ordinary, careful and skillful examination, (if possible,) so as to make a proper and true diagnosis; and if, for any reason, he did not care to make such examination or continue his connection with the case, it was his duty to retire therefrom, and to give the plaintiff due and timely notice of his intention so to retire; and if he continued his connection with the case, and it turned out that for want of such examination he had arrived at erroneous conclusions, and thus adopted the wrong treatment, to the injury of the patient; he is liable in damages.

(2309) The court instructs you that, if you believe from

the evidence that the defendant at the time he examined the plaintiff's injury, or at any subsequent time, gave the plaintiff improper directions or prescribed improper treatment for the same, and the plaintiff followed such directions, and the following thereof contributed unnecessarily to his pain or injury; then the defendant would be liable to the plaintiff in damages.

Contributory negligence.

(2310) The court instructs the jury that where the plaintiff has established the negligence of the defendant, and where the defendant alleges the contributory negligence of the plaintiff has contributed to the injury complained of, then the duty devolves upon the defendant to prove the contributory negligence of the plaintiff, and remains upon him during the trial; and where the defendant relies upon the contributory negligence of the plaintiff as a defense to the action, it devolves upon him to show, by a preponderance of the evidence, that plaintiff has been guilty of such negligent acts as have contributed to his injury.[2]

(2311) The court instructs the jury that, if the fault or negligence of the plaintiff, or his failure to follow the directions of the defendant, or to report correctly his condition, or to give opportunity to the defendant to observe his condition and to treat him, contributed to the plaintiff's alleged injury or present condition, or to the condition on account of which he makes complaint against the defendant, he cannot recover against the defendant therefor; and this is true where the natural temperament, physical weakness or constitutional condition of the plaintiff are the contributing causes to his said condition.[3]

(2312) The court instructs the jury that it is the duty of the plaintiff to co-operate with his physician and surgeon, and to conform to all the necessary prescriptions and direc-

[2] Becker v. Janinski, 27 Abb. N. C. 45.

[3] Becker v. Janinski, 27 Abb. N. C. 45.

tions regarding the cure or treatment of the disease or injury; and if he will not or does not, or if under the pressure of pain he cannot, then he cannot hold his surgeon responsible for any injurious consequences arising from his failure, from any cause, to obey such prescriptions or directions.[4]

Proof of charge.

(2313) The court instructs the jury that before they can find a verdict for the plaintiff, they must find from a preponderance of the testimony submitted in this case, three things, as follows:

1. That defendant did not with ordinary skill examine and treat plaintiff.

2. That such failure to so examine and treat with reasonable and ordinary skill, as defined in these instructions, resulted in injury to the plaintiff, which said injury—

3. Is due to such alleged lack of ordinary skill, and not to some or any other cause; and a failure so to establish any of these matters requires that the jury shall find a verdict for the defendant.

(2314) The court instructs the jury that, if they find from the testimony of the witnesses herein that the alleged condition of the plaintiff complained of in this case and the results detailed in evidence, are only such as with treatment of ordinary skill and care might reasonably be expected to result from the injury inflicted by the fall, in the condition in which the health of the plaintiff then was, then the verdict must be for the defendant; for the burden is cast by law upon the plaintiff to show by preponderance of the evidence submitted in the case that the injuries complained of, and for which damages are sought in this action, were caused by the negligence of the defendant, and not that such injuries might be, or possibly, or probably were, so caused.

[4] Becker v. Janinski, 27 Abb. N. C. 45.

(2315) The court instructs the jury that before they can return a verdict for the plaintiff, they must find from a preponderance of the evidence submitted in this case that there was a want of reasonable care; and in addition thereto, that the injuries or results complained of were the result of such lack of reasonable care.

(2316) The court instructs the jury that, unless they find from a preponderance of the evidence submitted in this case that the alleged treatment of plaintiff by defendant resulted in the injurious results now complained of; and a condition which, from a preponderance of the evidence in this case, the jury find would not have resulted under proper treatment; their verdict must be for the defendant, whether he properly examined or treated the plaintiff, or not.

(2317) The court instructs the jury that, although they may find from a preponderance of the evidence that the plaintiff sustained a fracture of the head of his left hipbone, and that his leg became shortened in consequence of the fracture, or during the course of treatment subsequent to the fracture; still the defendant is not liable in damages therefor, unless this shortening is shown by a preponderance of the evidence, to be due to the want of reasonable care on the part of the defendant.

(2318) The court instructs the jury that, before they can find for the plaintiff in this case, they must find from the evidence, not merely that the defendant was guilty of negligence in and about the matters complained of against him by the plaintiff, but that such alleged negligence produced the result complained of, and that without this negligence that result would not have occurred.

(2319) The court instructs the jury that it is not necessary, in order to sustain an action for malpractice against a surgeon, that there should be proof of gross culpability on his part; having engaged in the performance of services requiring skill and care, he is liable for the want of

the requisite skill, or for an omission to exercise proper care.

(2320) The jury is instructed that the mere fact that the plaintiff may have been a sufferer from the injury which he received, or that his leg is shortened, or that he is using crutches, will not justify you in finding a verdict for him. Before you are justified in finding a verdict for the plaintiff, you must believe from a preponderance of the testimony that the condition of the plaintiff complained of in this action is the result of negligence upon the part of defendant, as heretofore defined in previous instructions.

Presumptions from failure to effect cure.

(2321) The court instructs the jury that the failure on the part of the defendant to effect a cure of the injuries alleged to have been sustained by the plaintiff, raises no presumption, and is not evidence of a lack of proper care, skill and diligence in examining or in treating the plaintiff.

X ray photographs.

(2322) The court instructs the jury that the court admitted in evidence the skiagraphs, or X ray photographs as they are called in the testimony, not as evidence of facts, but merely secondary evidence for the use of witnesses in explaining and illustrating their testimony. They are not to be taken as establishing or proving any substantive fact of the case.

(2323) The court instructs the jury that, for the purpose of determining whether or not the defendant used reasonable skill and diligence proper under the circumstances in this case, in the examination and treatment complained of by the plaintiff against the defendant, the question is to be determined by reference to the facts known, or ascertainable by the use of reasonable skill and diligence by the defendant at the time of the making of said examination

and the advising and giving of such treatment, and not by matters only learned or which were only ascertained thereafter, or by means not then possessed or available to the defendant in the matter of such examination and treatment; and that such evidence as has been admitted by the court concerning the taking of X ray photographs, or skiagraphs as they have been called in the testimony, measurements and other examinations are not for the purpose of determining whether or not proper skill and diligence were employed by the defendant in the making of such examinations and treatment, but for the purpose of ascertaining, so far as thereby can be done, the condition of said plaintiff's alleged injury subsequent to such examination and treatment and at the present time; for the responsibility of the defendant is to be determined by the means at his command, and information possessed by him at the time it is alleged by the plaintiff that he was guilty of the negligence complained of.[5]

CHAPTER CV.

PLEDGE.

What are or may be secured, 2324.
Necessity of legal debt to support pledge, 2325.
Necessity of mutual assent, 2326.
Pledge for pre-existing debt without new consideration or forbearance, 2327.
Delivery of possession to pledgee and continuity thereof, 2328.
Symbolical or constructive delivery to pledgor, 2329.
Possession interrupted by bailment back to pledgor, 2330.
Duty of pledgee of commercial paper, 2331.
Right of pledgee as to expenses and profits, 2332.

What are or may be secured.

(2324) The court instructs the jury that the defendant is

[5] This instruction is taken from the records of the unreported case of Smith v. Grant (Arapahoe County, Colo., district court), one of the first cases in which an X ray photograph of an injured bone was introduced. The instruction was prepared by able attorneys and given by the court after thorough discussion and is commended.

entitled to possession of the property, if the jury find from the evidence that the pledge was given to secure certain debts, either existing at the time of making the pledge, or was given in view of an indebtedness to be created in the future, or to secure the payment of debts owing by a third person.[1]

Necessity of legal debt to support pledge.

(2325) The court instructs the jury that, if they find from the evidence that the property in question was delivered by plaintiff to defendant as security for a debt, but that said debt was for money contracted for (state what the debt was for, e. g. wine and suppers supplied by the plaintiff to defendant in a brothel to be there consumed in a debauch), then (plaintiff is equally in the wrong with defendant and cannot recover).[2]

Necessity of mutual assent.

(2326) The court instructs the jury that no pledge can be created unless both the parties thereto have assented to it; and unless the jury shall find from the facts that the plaintiff assented to the taking of the chattel in question, by the defendant as a pledge, defendant is not entitled to (retain the custody of such chattel); or, if the jury shall find that plaintiff did consent to the taking of the chattel in pledge, but that defendant procured such consent by (state what means he took, e. g., falsely and fraudulently representing to the plaintiff that—state what was the representation made),—then you must find that defendant had no right to (possession of such chattel).[3]

[1] If the pledge is claimed on particular debts only and not on others state what they were.

[2] Change words if necessary to conform to facts in the case or to the nature of the judgment or relief sought.

Taylor v. Chester, Law Rep. 4 Queen's Bench 309; Chitty on Contracts (6th Ed.) 579.

[3] Change wording to conform to facts in case or to relief sought.

Mead v. Bunn, 32 N. Y. 275.

Pledge for pre-existing debt without new consideration or forbearance.

(2327) The court instructs the jury that, if they find from the evidence that the property in question was delivered to defendant by one (state whom), to secure a debt previously due and owing by (state whom) to defendant, and if you find that defendant made no extension on said debt as a consideration for receiving security therefor, and gave no other consideration of value, and suffered no disadvantage in consideration of receiving such security; and if you further find that at the time plaintiff was the true and lawful owner of the property in question; then, in that case, defendant has no right to hold possession of the property as against plaintiff, and your verdict must be for the plaintiff.[4]

Delivery of possession to pledgee and continuity thereof.

(2328) The court instructs the jury that, in order that defendant may have the right to hold the property in question as a pledgee, the jury must find from the facts that the property in question was delivered by the plaintiff to the defendant, and that defendant accepted the same from plaintiff, and continued thereafter, without interruption from plaintiff, to be in possession of it.

Symbolical or constructive delivery to pledgor.

(2329) The court instructs the jury that it is not necessary to find from the evidence that an actual manual delivery was made; but it is sufficient if they find from the evidence that such transfer of possession or dominion over the property was made, as the property was, in its nature, capable of; or, it is sufficient if the jury find that the delivery was made by transferring to defendant a (state what was

[4] First Nat. Bank v. Broadway Nat. Bank, 22 App. Div. 24; Huldeman v. German Security Bank of Kentucky (Ky. App.) 44 S. W. 383.

delivered, e. g., properly indorsed warehouse receipt entitling the defendant to take possession of the property).[5]

Possession interrupted by bailment back to pledgor.

(2330) The court instructs the jury that, if they find from the evidence that plaintiff delivered the property in question to the defendant, as a pledge to secure the payment of a debt; and that defendant thereafter re-delivered the property to plaintiff, but that such re-delivery was only temporary, and not for the purpose of surrendering possession back to the plaintiff; then the possession of defendant is not regarded, in law, as having been interrupted, and your verdict will be for the defendant.[6]

Duty of pledgee of commercial paper.

(2331) The court instructs the jury that it is the duty of a pledgee of commercial paper, with respect to the owner of such paper, to use reasonable diligence to protect such paper, and to see that it does not become uncollectible; and if the jury find that the defendant received the notes in controversy as a pledge, and that such notes were made by solvent persons, and might, with reasonable diligence, have been collected at maturity; but defendant did not then collect them and (state facts showing lack of diligence, e. g., thereafter the makers of the notes became insolvent and the notes uncollectible); defendant is liable for the loss occurring by reason of such neglect, and your verdict will be for the plaintiff.[7]

Right of pledgee as to expenses and profits.

(2332) The court instructs the jury that a pledgee of property has a right to make any expenditures for its proper care and protection, which are usual and necessary, and is entitled to collect and hold all profits which accrue to the

[5] Whitney v. Tibbitts, 17 Wis. 369.

[6] Casey v. Caveroc, 96 U. S. 467.

[7] Northwest Nat. Bank v. Thompson Mfg. Co., 36 U. S. App. 413.

property while it is in the hands of the pledgee, and to apply such profits, so far as they are capable of it, to the payment of the debt secured; and if you find from the evidence that defendant did incur such necessary and usual expense, and did receive and collect certain profits accruing to the property in controversy; then the plaintiff is liable to the defendant in the amount of the principal debt secured, with interest thereon, together with the amount expended necessarily and reasonably for the care and protection of the property in controversy less the amount of such profits so received and applied upon the debt secured.

CHAPTER CVI.

RAILROADS.

I. Negligence in General.

Care required of defendant's servants in general, 2333, 2334.
Speed ordinances, 2335.
Irregularity in running trains as negligence, 2336-2339.
Ejection of trespassers, 2340-2342.
Collision between trains at railroad crossing; 2343-2346.
Liability for depositing debris on adjacent lands, 2347.

II. Accidents at Crossings.

A. *Care Required of Company.*

Degree of care required in general, 2348-2351.
Relative rights at crossings, 2352.
Precautions as to persons seen on or near crossing, 2353-2357.
Dangerous nature of crossing, 2358, 2359.
Care required of company operating its trains on streets, 2360, 2361.
Necessity that excess of speed should be cause of accident, 2362.
Permitting view of crossing to become obstructed, 2363, 2364.
Obstruction of view and failure to ring gong, 2365.
Flag men, 2366, 2367.
Warning signals, 2368-2371.
Same—Duty to whistle or ring at private or farm crossing, 2372.
Same—Whether required to both ring and whistle, 2373, 2374.

Same—Necessity of continuous signal, 2375-2377.
Same—Failure of signal as merely evidence of negligence, 2378.
Same—Sufficiency of evidence of ringing bell, 2379.
Same—Frightening team, 2380-2385.
Failure of signals and excess of speed, 2386.
Necessity for lookout and lights on trains backed across highway, 2387-2390.
Flying switches, 2391, 2392.

B. *Contributory Negligence.*

Care required in general, 2393-2399.
Crossing in front of approaching train, 2400.
Care required of persons with team and vehicle, 2401-2403.
Knowledge of danger, 2404.
Reliance on care of railroad company, 2405.
Rate of speed of train or disregard of schedule as excuse for want of care, 2406, 2407.
Failure to give signals as excusing want of care, 2408-2412.
Care required though gates are not lowered and signals not given, 2413.
Care required of person in vehicle driven by another, 2414.
Disregard of warnings, 2415.
Acts in emergencies, 2416, 2417.
Violation of ordinance by injured person, 2418.
Acts where gates let down, 2419.
Injury to intoxicated person, 2420, 2421.
Duty to stop, look, and listen, 2422-2427.
Same—Duty where view obstructed, 2428-2434.
Same—Duty as a continuous one, 2435-2437.
Same—Duty to look in different direction, 2438, 2439.
Same—Presumption that party stopped, looked, and listened, 2440.
Evidence of care on part of injured person, 2441, 2442.
Presumptions and burden of proof of contributory negligence and its absence, 2443-2447.
Injury avoidable notwithstanding contributory negligence, 2448-2450.

III. Injuries to Persons on or Near Track.

Use of right of way for foot path, 2451-2455.
Same—Duty of engineer knowing of use of right of way by pedestrians, 2456, 2457.
Duties of company where tracks are numerous and district frequented by public, 2458.
Duty as to children on track, 2459-2461.
Injuries to persons on station platform, 2462.

Injuries to persons unloading cars, 2463.
Injuries by collision with slack car, 2464.
Injury to employe of another company—Whether employe or trespasser, 2465.
Duties as to lights on rear of trains backing into station, 2466.
Duty of care on discovery of person negligently in a perilous position, 2467-2472.
Injuries to one going on track to save team, 2473, 2474.
Injuries to person on bridge, 2475.
Contributory negligence, 2476-2478.
Same—Duty of person with defective hearing, 2479.
Right of jury to consider surroundings of accident, 2480.
Burden of proof of negligence, 2481.

IV. Injuries to Animals.
Defective fences and cattle guards, 2482-2485.
Same—Liability under statute requiring a railroad company, operating its road for six months, to fence its road, 2486.
Same—Location of fence—Injuries to crops of adjoining landowner, 2487, 2488.
Same—Liability where sufficient fence broken down by frightened animal, 2489.
Same—Effect of agreements to maintain fence, 2490, 2491.
Same—Repair of fence thrown down or destroyed without company's fault, 2492, 2493.
Same—Fact of killing as tending to show insufficiency of fence, 2494.
Same—Cattle guards, 2495, 2496.
Care after discovery of animals on track, 2497.
Warnings and signals, 2498-2500.
Contributory negligence of owner in general, 2501.
Determination of question of place of killing, 2502.
Duty to anticipate presence of cattle on track, 2503.
Liability of railroad company for killing of stock by train belonging to another company, 2504.

V. Fires.
Care required in general, 2505, 2506.
Risks borne by parties erecting buildings in proximity to railroad track, 2507.
Combustibles on railroad property, 2508.
Defective smoke stacks and spark arresters, 2509-2516.
Fire communicated from burning building set on fire by sparks from locomotive, 2517.
Same—Liability for fire communicated from depot not owned by defendant, 2518, 2519.
Duty of adjoining landowner to keep premises free from rubbish, 2520, 2521.

Plaintiff's duty to take steps to prevent spread of fire, 2522.
Presumptions and burden of proof of negligence, 2523-2527.
Sufficiency of proof, 2528, 2529.

I. NEGLIGENCE IN GENERAL.

Care required of defendant's servants in general.

(2333) The court instructs the jury that it was the duty of the defendant's servants, in the running and handling of said east-bound engine and train of cars, to have exercised that degree of care and prudence which an ordinarily careful and prudent person, engaged in like business, would have exercised under like circumstances; and a failure to exercise such a degree of care and prudence, would render the defendant guilty of negligence in that respect.[1]

(2334) The court instructs the jury that, if they find that on or about the —— day of ——, 19—, the plaintiff was injured by the locomotive or cars of defendant while operated by its agents on its road, and that such injury resulted directly from the want of ordinary care and prudence of the agents of the defendant, and not from the want of ordinary care and prudence on the part of the plaintiff directly contributing to the injury; then the plaintiff is entitled to recover.[2]

Speed ordinances.

(2335) The court instructs the jury that the ordinance of the city of S., read in evidence, in relation to the speed of defendant's train and ringing of the bell was in force at the time of the injury to M., and that defendant at said time had no legal right to run its said train, at the place of the injury, at a greater rate of speed than six miles per hour; and if defendant was at said time running its said train at a higher rate of speed than six miles per hour, and

[1] Approved in Schmitt v. Missouri Pac. Ry. Co., 20 Am. & Eng. Ry. Cas. (N. S.) 219.

[2] Approved in Philadelphia, W. & B. R. Co. v. Hogeland, 66 Md. 149.

did thereby directly cause the injury and death of said M.; and if the jury further find that said M. was at the time exercising ordinary care; then defendant is liable.[3]

Irregularity in running trains as negligence.

(2336) The court instructs the jury that defendant railway had the right to run its trains over its road at any hour of the day or night, and the fact that the train in question was an extra train, or not running on schedule time, could not constitute negligence.[4]

(2337) The court instructs the jury that the engineer and fireman in managing the train are at liberty, and it is their duty to run their train as nearly on time as possible; and in case of a way freight, whose length of stops at the stations is necessarily irregular; they are not to be considered negligent by their use of natural and reasonable means to make time.[5]

(2338) The court instructs the jury that you are to consider that the necessity of running railroad cars with regularity and uniformity is not a matter of convenience merely. The business cannot be done at all, unless calculations are made upon the movements of trains. The risks attending upon a disturbance of that regularity, are risks of human life, and not mere business delays. It would be in the highest degree dangerous to make the movements of the cars vary with the wind and water.[6]

(2339) The court instructs the jury that those who establish themselves in the neighborhood of railroads, must know that trains are expected to run with regularity; and if there are special risks arising from no want of care in

[3] McManamee v. Missouri Pac. Ry. Co., 135 Mo. 440.

[4] Approved in Graybill v. Chicago, M. & St. P. Ry. Co., 112 Iowa, 738.

[5] Approved in Hagan v. Chicago, D. & C. G. Trunk Junction R. Co., 86 Mich. 615.

[6] Approved in Hagan v. Chicago, D. & C. G. Trunk Junction R. Co., 86 Mich. 615.

the proper equipment and management of engines and trains, those risks are not chargeable to the railroad, but are incident to the situation.[7]

Ejection of trespassers.

(2340) The court instructs the jury that, if they believe from the evidence that the brakemen on the trains run by conductor K. were in the habit of expelling trespassers from said trains without orders from K., but in his sight or hearing, and with his approval and assent at the time; they are instructed that all expulsions so made must be construed to be the acts of K., and must not be considered as a violation of the rules and regulations of the defendant that require its brakemen to report such trespassers to their conductors.[8]

(2341) The court instructs the jury that, if they believe from the evidence that at the time of the accident complained of the plaintiff, ———, got on one of defendant's trains at or near ———; and that in attempting to alight from said train or otherwise he fell and was injured, without any force being used on the part of the defendant or its servants to cause said fall; then the jury are instructed that the said plaintiff was a trespasser, and that they must find a verdict for the defendant.[9]

(2342) The court instructs the jury that, although they may believe that A., the plaintiff, had no business or right to be on defendant's train, and was a trespasser thereon; yet, if they further believe that he was given no reasonable opportunity to get off the train without exposing himself to danger, but was forced to leave the train while the same was in motion, by reason of force exercised by the employees of said company, or any of them, within the scope of their em-

[7] Approved in Hagan v. Chicago, D. & C. G. Trunk Junction R. Co., 86 Mich. 615.

[8] Chesapeake & O. Ry. Co. v. Anderson, 93 Va. 650.

[9] Chesapeake & O. Ry. Co. v. Anderson, 93 Va. 650.

ployment; and that in so leaving he received the injuries complained of; they must find a verdict for the plaintiff.[10]

Collision between trains at railroad crossing.

(2343) You are instructed that, if you believe from the evidence that the engineer operating the engine of the F. W. & D. C. Ry. Co., mentioned by the witness, failed, on approaching the crossing of the G., C. & S. F. Ry. Co., to bring his engine to a full stop before reaching the crossing at such distance therefrom as, under the circumstances, common prudence would dictate as necessary to avoid colliding with the train on the track of the G., C. & S. F. Ry. Co.; and that by reason of such failure to stop within such distance, the collision occurred; the defendant would be negligent and liable to the plaintiff for any injury that he may have sustained on account of the negligence.[11]

(2344) The court instructs the jury that, if you further believe from the evidence that after it became probable that in the ordinary course of events, if such was the case, a collision would occur; said engineer of the F. W. & D. C. Ry. Co. omitted to employ that degree of care that a man of ordinary caution would have exercised under the circumstances to stop his engine before reaching the crossing and avoid the collision; and that by the use of such care he would have stopped his engine and prevented the collision, or that he failed to exercise that degree of care that a man of ordinary prudence would have used under the circumstances in endeavoring to get his engine and train over the crossing in the manner in which he attempted to do; and that by such failure he rendered himself unable by the use of the means at his command to stop his engine and avert the collision; and that the collision resulted from such failure of care and consequent inability to stop; if there was

[10] Chesapeake & O. Ry. Co. v. Anderson, 93 Va. 650.

[11] Approved in Fort Worth & D. C. Ry. Co. v. Mackney, 83 Tex. 410.

such failure and inability, the defendant would be negligent and liable to plaintiff for any injury plaintiff may have sustained by reason of said collision.[12]

(2345) You are further instructed that, if you believe from the evidence that the plaintiff knew that the train of the F. W. & D. C. Ry. Co. was approaching the crossing at the time that the engine he was on was approaching said crossing; and that he failed to notify the engineer of the engine he was on of the fact that said train of the F. W. & D. C. Ry. Co. was approaching the crossing, and request him to stop the engine; or that, under the circumstances in which he was placed, a person of ordinary prudence would have kept a lookout to ascertain whether there was a train approaching on the track of the F. W. & D. C. Ry. Co., and that he failed to keep such lookout: in either event, plaintiff would be guilty of negligence, and defendant would be entitled to a verdict.[13]

(2346) If you believe from the evidence that the engineer in charge of said engine of the F. W. & D. C. Ry. Co. did stop his engine within the proper distance of said crossing, as above indicated; but if you believe from the evidence that said engineer, after having stopped his engine, started said engine toward the crossing; and that when he did so he knew that the train of the G., C. & S. F. Ry. Co. was approaching said crossing; and that the situation was such as to indicate to a man of ordinary prudence, occupying the position in which said engineer was at the time, that to proceed across said crossing would probably, and in the ordinary course of events, result in a collision with the train of the G., C. & S. F. Ry. Co.: the defendant would be negligent, and liable to plaintiff for any injury plaintiff may have sustained by reason of said collision.[14]

[12] Ft. Worth & D. C. Ry. Co. v. Mackney, 83 Tex. 410.

[13] Approved in Fort Worth & D. C. Ry. Co. v. Mackney, 83 Tex. 410.

[14] Approved in Fort Worth & D. C. Ry. Co. v. Mackney, 83 Tex. 410.

Liability for depositing debris on adjacent lands.

(2347) The court instructs the jury that, if they believe from the evidence in the cause that the defendant company, in the construction of its road through plaintiff's land, deposited earth, rock and other matter upon the plaintiff's land; that it then became the duty of the defendant company to remove such earth, rock and matter in a reasonable time; and if they believe from the evidence that the company failed to do so in a reasonable time; then, they shall find for the plaintiff whatever damage he has sustained thereby.[15]

II. Accidents at Crossings.

A. *Care Required of Company.*

Degree of care required in general.

(2348) The jury are further instructed that a higher degree of care and diligence is required of railroad companies at public crossings, than on an ordinary roadbed of railroad; and this care and diligence is increased in proportion to the travel over the crossing, and its location in a city or town, as compared with sparsely settled country; and the negligence of the company is to be determined by its conduct in relation to the same.[16]

(2349) The court instructs the jury that it is the duty of both the railroad company and of those operating its trains, and of persons traveling along the public highway, to use reasonable care and ordinary prudence to avoid collision at any point where the company's road and such public highway may cross each other; and if a collision should occur at any such crossing, and any injury should happen from such collision, and neither party should be guilty of negligence in causing such collision; then no action could be maintained by reason of such an injury. It would be an accident for which the law offers no remedy.[17]

[15] Norfolk & W. R. Co. v. Carter, 91 Va. 587.

[16] Baltimore & O. R. Co. v. Few's Ex'r, 94 Va. 82.

[17] Approved in Gulf, C. & S. F. R. Co. v. Greenlee, 70 Tex. 553.

(2350) The court instructs the jury that, if the injuries complained of were the result of mere accident; and if neither plaintiff nor defendant's servants in charge of the train committed a fault, causing or contributing to the accidental collision; then the jury will find for the defendant. Neither party can be required to answer to the other for accidental mischance.[18]

(2351) The court instructs the jury that, if they find from the evidence that the defendant was at the time of the happening of the alleged injury, of which the plaintiff complains, the owner of a railroad with several tracks running through the city of ——— and across the streets thereof; and was engaged in moving trains propelled by steam thereon; then, in the management of said trains, the defendant was bound to use such care and caution to prevent injury to persons traveling along said streets, where they are crossed by said tracks, as prudent and discreet persons would have used and exercised under like circumstances; and if they find that on the night of the —— of ——, 19—, the plaintiff, while crossing the railroad of the defendant on ——— street, in said city, was run over by the cars of the defendant and injured, as stated in the testimony; and that such injury was caused by the negligence of the defendant or its agents in charge of said cars; and that, by the exercise of ordinary care and caution by the defendant or its agents, the accident causing said injury could have been avoided; the plaintiff is entitled to recover, if the jury further find that the plaintiff was, at the time of the accident, using due care and caution on his part.[19]

Relative rights at crossings.

(2352) The court instructs the jury, as a matter of law, that both the plaintiffs and the defendant, the railway company, had an equal right to cross the street at the point

[18] Kenney v. Hannibal & St. J. R. Co., 105 Mo. 270.

[19] Approved in Baltimore & O. R. Co. v. Kean, 65 Md. 394.

where the accident happened, and that the law imposes upon both parties the duty of using reasonable and prudent precaution to avoid accident and danger; and, while it was incumbent upon the railway company to run its train on the occasion referred to, and to give the required signal by ringing the bell for eighty (80) rods before reaching the crossing, it was also the duty of the plaintiffs to look out for the approach of the train, and to observe all reasonable precautions before attempting to cross the railway track.[20]

Precautions as to persons seen on or near crossing.

(2353) The court instructs the jury that it was the duty of the defendant's employees, who were controlling the engine and train of cars on the morning of —— the —— day of ——, 19—, to have exercised ordinary care and diligence in keeping a lookout to avoid injuries to the said F., and to warn him of approaching danger, as well as to have exercised great care and diligence in avoiding the injury to him after having seen him in danger.[21]

(2354) The court instructs the jury that the engineer was justified in assuming that, if plaintiff's intestate could have seen or heard the train causing the injury, in time to remain in a place of safety, he would have remained there.[22]

(2355) The court instructs the jury that the engineer of a train was justified in assuming, if his locomotive was in sight and the horse driven by the injured person was under control, that an attempt would not be made to pass in front of the locomotive.[23]

(2356) The court instructs the jury that, if the engineer saw that deceased was in danger of being run into when

[20] Approved in Chicago & N. W. R. Co. v. Hatch, 79 Ill. 137.

[21] Approved in Baltimore & O. R. Co. v. Few's Ex'r, 94 Va. 82.

[22] Approved in Bump v. New York, N. H. & H. R. Co., 38 App. Div. 60.

[23] Approved in Bump v. New York, N. H. & H. R. Co., 38 App. Div. 60.

he reached the crossing, provided all the speed of his engine was not checked, it was his duty to do all reasonably within his power to prevent the disaster by proper efforts to stop his train as soon as he could.[24]

(2357) The court instructs the jury that, if they believe from the evidence that the engineer was looking out for a flag on the right-hand side of the road, at a place shortly beyond where the deceased was injured, and just before he was struck; and that the engineer did not see the defendant on the track or know he was there until too late to stop; then, under the evidence in this case, the negligence of the engineer, if such there was, was not such gross, wanton, intentional wrong as will make the defendant liable, provided the jury find the deceased walked down or on the track without looking back.[25]

Dangerous nature of crossing.

(2358) The court instructs the jury that, if they believe from the evidence that the approach to the crossing where F. was killed was extra dangerous, then it was the duty of the defendant to use extra care to prevent accidents to travelers, and to use reasonable precautions to warn and protect travelers against approaching trains; the degree of care required of the defendants, as well as the plaintiff, being measured by the dangerous character of the crossing. And, as to whether such reasonable precautions were used or adopted by defendants, is a question for the jury to determine.[26]

(2359) If the jury believe from the evidence that the defendant was bound to maintain and keep the crossing in evidence described in good and safe condition, and that the defendant negligently failed so to do, and by reason of such failure F. came to his death; and further believe that

[24] Approved in Bump v. New York, N. H. & H. R. Co., 38 App. Div. 60.

[25] Approved in Frazer v. South & North Ala. R. Co., 81 Ala. 185.

[26] Approved in Kimball v. Friend, 95 Va. 125.

such failure so to do was the immediate and proximate cause of his death; then the jury should find for the plaintiff.[27]

Care required of company operating its trains on streets.

(2360) The court instructs the jury that a railroad company, operating its trains on the thoroughfare of a village, must use greater care than in less frequented localities; and any neglect of any precautions, proper in the peculiar circumstances of the locality, constitutes negligence.[28]

(2361) The court instructs the jury that a railroad company, running and operating its trains on the streets of a city, must use greater care and diligence to prevent injuries to persons and property, than is required of them in running and operating their trains in less frequented and populous localities; and so, in certain localities in the town, greater precautions may be necessary than in others; for example, if the train is being carried around a corner, objects or persons on the other side of which are hidden from view, it is required of them to resort to special precautions, depending upon the particular locality and the circumstances to avoid accidents; and any neglect of such precautions as are proper, under the peculiar surroundings and circumstances of the locality, constitutes negligence, for which the railroad company is liable in damages, unless the plaintiff's intestate, by the exercise of ordinary care on his part, could have prevented the accident; and courts do not hold a person who is faced with a sudden danger to the same degree of judgment and presence of mind as would otherwise be required of him; and the burden of proof is on the railroad company to prove such absence of ordinary care on the part of the plaintiff's intestate.[29]

Necessity that excess of speed should be cause of accident.

(2362) The court instructs the jury that even, if you

[27] Approved in Baltimore & O. R. Co. v. Few's Ex'r, 94 Va. 82.

[28] Approved in Florida Cent. & P. R. Co. v. Foxworth, 41 Fla. 1.

[29] Approved in Kimball v. Friend, 95 Va. 125.

should find that the speed of the train was greater than six miles an hour; yet, unless you further find from the evidence that the rate of speed in excess of six miles an hour was the cause of the injury; the question of negligence as to the rate will not be considered by you.[30]

Permitting view of crossing to become obstructed.

(2363) The court instructs the jury that, if you believe from the evidence that defendant permitted obstructions to be placed and remain upon its track and right of way, so as to obstruct the view of plaintiff in approaching the public crossing in the town of ———; and if you believe such acts, if any, constituted negligence on the part of defendant, and that they were the proximate cause of plaintiff's injuries; and that plaintiff did not by his negligence contribute to his injuries; then you will find your verdict for the plaintiff.[31]

(2364) The court instructs the jury that, if they believe from the evidence, and from a view of the place where the accident is alleged to have taken place, that the view of an approaching train was obstructed by an embankment or otherwise; and that ordinary care would have required other precautions than those employed, and that the defendants did not use such other precautions; then they must conclude that the defendants were guilty of negligence; and if they believe further from the evidence that plaintiff did not know that the engine was nearing the crossing, so as to endanger his passing over it, but acted as an ordinarily prudent man would act under the circumstances; they must find for the plaintiff such damages as are proper, not exceeding the amount claimed in the declaration.[32]

[30] Approved in Weller v. Chicago, M. & St. P. Ry. Co., 22 Am. & Eng. Ry. Cas. (N. S.) 61.

[31] Approved in Galveston, H. & S. A. Ry. Co. v. Michalke, 14 Tex. Civ. App. 495.

[32] Approved in Kimball v. Friend, 95 Va. 125.

Obstruction of view and failure to ring gong.

(2365) The court instructs the jury that, if they believe from the evidence that F. approached the crossing where he met his death, as an ordinarily prudent man would do, traveling as he was on a bicycle; and that the electric gong did not sound to warn him of the approaching engine when he was about to cross, and that if said electric gong had sounded, it would have warned him of the approaching engine in time to escape; and that no other sufficient warning of the approaching engine was given; and that the embankments were such as to prevent his seeing the engine in time to escape, and he lost his life thereby; and that he listened for the approach of the train, and failed to hear: they must find for the plaintiff.[33]

Flag men.

(2366) The court instructs the jury that, under the ordinance of the city of ———, it was the duty of the defendant railroad company to keep and maintain a flagman at the crossing, where it is alleged in the declaration that the plaintiff was injured by a collision with a train operated by the defendant; and if the jury believe from the evidence that the plaintiff was injured by a collision at said crossing; and that at the time of the accident there was no flagman present at such crossing; or if they believe from the evidence that no flagman gave warning of the approach of the train which collided with the plaintiff; and if the jury believe from the evidence that, before the plaintiff attempted to cross defendant's track, he stopped and looked and listened to see if any trains were approaching, and was using due care; and that he did not know of the approach of any train of defendant, and did not see or hear of the approach of any train, and received no notice or warning of the approach of any; and was struck by a train of cars of defendant at the time and place

[33] Approved in Kimball v. Friend, 95 Va. 125.

mentioned in the declaration; then plaintiff is entitled to recover the damages sustained by reason of such collision.[34]

(2367) The court instructs the jury that the defendant was not required by law to station a flagman at the road crossing, near which the accident complained of is testified to have occurred; and the jury cannot infer negligence on the part of the defendant, because the defendant did not keep a watchman or flagman at or near said crossing, or because said defendant did not have any person at or near the place of said accident, to warn persons of danger in attempting to cross the railroad track at that place, or to prevent them from attempting to cross at said point.[35]

Warning signals.

(2368) The court instructs the jury that it was the duty of the defendant in approaching the ——— crossing, either to ring a bell or sound a whistle; and that such duty to ring a bell or to sound a whistle continued until the crossing was reached; and if you find from the evidence that plaintiff was injured as charged in the declaration, and defendant failed in the duty so to ring or to whistle as heretofore stated; and that in failing to perform its duty in this regard the defendant was negligent, and that such negligence was the cause of the injury to the plaintiff for which he sues; then you will find the issues for the plaintiff, provided you also believe from the evidence that plaintiff, at the time of the injury, was in the exercise of ordinary care for his own safety.[36]

(2369) The court instructs the jury that, if they believe from the evidence that the engine of the defendant ap-

[34] Pennsylvania Co. v. Frana, 13 Ill. App. 91.

[35] Approved in Baltimore & O. R. Co. v. Owings, 65 Md. 502.

[36] Chicago, B. & Q. R. Co. v. Pollock, 195 Ill. 156.

Of course it will be borne in mind that the above instruction is only pertinent under the statutes making it the duty of railroad companies to give signals before approaching crossings.

proached the crossing described in the declaration at a slow rate of speed, after having blown its whistle for said crossing in a proper manner, with its bell ringing; and the gong having rung until the engine was within a few feet of the crossing; and that they could not have prevented the accident after they discovered the danger of the plaintiff's intestate, ———, that the railroad company, having a right to occupy its own track with its engines for the proper conduct of its business, was within those rights, and is not guilty of negligence; and the jury must find for the defendant receivers.[37]

(2370) The court instructs the jury that, under the laws of this state, defendant was bound by its servants to ring a bell or sound a whistle when its train reached a point eighty rods distant from any highway crossing, and to keep sounding the whistle or ringing the bell until the crossing is reached; and in this case, if the jury believe from the evidence that the defendant by its servants neglected to ring the bell or sound the whistle continuously for eighty rods before the train reached the highway crossing, at which it is alleged the plaintiff's intestate was killed by collision with defendant's train; and that by reason of such neglect to ring the bell or sound the whistle, plaintiff's intestate was killed; then, in that case, the jury shall find for plaintiff, if they further believe from the evidence that plaintiff's intestate was in the exercise of care and caution to avoid collision with any passing trains, and used precaution before going upon defendant's railroad track to ascertain whether any train was approaching; and if the jury further believe from the evidence that plaintiff was the administrator of said intestate.[38]

(2371) The court instructs the jury that, if they believe from the evidence that the whistle was not, at least twice,

[37] Approved in Kimball v. Friend, 95 Va. 125.

[38] Approved in Chicago, B. & Q. R. Co. v. Harwood, 89 Ill. 88.

sharply sounded, at a distance not less than three hundred yards before the highway crossing, referred to in the plaintiff's declaration, was reached; and that such failure to so sound the whistle at such distance tended to cause the accident complained of in said declaration; then the defendant, the ——— Railway Company, is liable for all damages caused by such neglect; and they must find for the plaintiff, unless they believe from the evidence that the plaintiff, by his own negligence and recklessness, directly and proximately contributed to the act which caused the injury.[39]

Same—Duty to whistle or ring at private or farm crossing.

(2372) The court instructs the jury that the defendant railroad company is not bound to whistle or ring the engine bell when approaching a private or farm crossing; and, further, that said defendant railroad company may regulate the speed of trains approaching private crossings as it may desire by its own regulations; but, nevertheless, the jury are instructed that said defendant railroad company, knowing that said private crossings are likely to be used by persons passing over and upon the railroad track, are bound, when approaching said crossings, to keep a proper lookout, and to use all reasonable precautions when approaching said private or farm crossing, to prevent injury to any one on or approaching such crossings.[40]

Same—Whether required to both ring and whistle.

(2373) The court instructs the jury that the statute requiring the bell to be rung, or the whistle to be blown at crossings, is intended for the protection of those passing over the track at such crossings, and not for those using the track elsewhere; and said statute is complied with, when either the bell is rung or the whistle blown.[41]

[39] Atlantic & D. Ry. Co. v. Reiger, 95 Va. 418.

[40] Approved in Morgan v. Wabash Ry. Co., 159 Mo. 262.

[41] Approved in Davidson v. Pittsburg, C., C. & St. L. Ry. Co., 41 W. Va. 407.

(2374) The court instructs the jury that the defendant is not required on approaching a crossing to ring a bell, and at the same time sound a whistle; it is sufficient if the defendant either rang a bell or sounded a whistle on approaching the crossing beginning at the distance from the crossing which the statute prescribes.[42]

Same—Necessity of continuous signal.

(2375) The court instructs the jury that it was the duty of the defendant's servants, in charge of said east-bound engine and train of cars, while running or moving within the limits of the city of S., to cause the bell on the engine thereof to be constantly sounded; and, if you believe from the evidence that the bell on the engine of the train in question was not constantly sounded, while said train was running or moving within said limits, then you should find that the defendant was guilty of negligence in that respect.[43]

(2376) The court instructs the jury that, for the purposes of this case, this (here insert name of street) was such a public street as required the railroad company, as a matter of law, either to blow a whistle or ring a bell from the time it (here insert the statutory distance, as, it turned the corner of Atlantic Avenue), until after it reached (here insert name of street where accident occurred); so that, if you shall find that they failed to ring the bell or blow the whistle up to the point where the tender or engine reached (here insert name of street where accident occurred), and plaintiff was struck at that point; that is negligence. They must do one or the other; and do it continuously, or for a sufficient time to give warning to any body attempting to cross there, from the time they (here insert statutory distance, as, turned the corner where the train came in sight), until after the loco

[42] Suburban R. Co. v. Balkwill, 195 Ill. 535.

[43] Approved in Schmitt v. Missouri Pac. Ry. Co., 20 Am. & Eng. Ry. Cas. (N. S.) 216.

motive had reached or started to cross (here insert name of street where accident occurred).[44]

(2377) The court instructs the jury that, if they believe from the evidence that on the ——— day of ———, 19—, the defendant's train approached the point mentioned in the evidence and described in the declaration, and that at such point a traveled public road crossed the defendant's railroad; and that the bell of the locomotive engine which hauled said train was not rung before reaching a point eighty rods distant from the crossing and kept ringing until the said engine crossed said public road; and that the steam whistle attached to said engine was not sounded on or before reaching a point eighty rods from said crossing, and that the said steam whistle did not continue to be sounded until the said engine crossed the said public road; and that plaintiff was approaching said crossing on said traveled public road in a buggy with his wife; and that by reason of said failure of defendant's servants upon said train to sound said whistle or ring said bell; the said engine struck the buggy of plaintiff while the same was crossing said public road, and killed plaintiff's wife, and injured plaintiff and plaintiff's buggy; and that, at the time of said injury, the plaintiff was exercising ordinary care in crossing said railroad; the jury will find for the plaintiff on each of the three counts of the petition, and assess the damages on the first count at $5,000; and on the second count at such amount as the jury believe from the evidence plaintiff has sustained, by reason of the bodily injuries received by him, not to exceed the sum of $10,000; and on the third count such a sum as the jury believe from the evidence plaintiff's buggy was damaged not to exceed $100; and the term "ordinary care" as used in this instruction, means such care as a man of ordinary prudence would exercise under like circumstances.[45]

[44] Approved in Smedis v. Brooklyn & R. Beach R. Co., 88 N. Y. 13.
[45] Kenney v. Hannibal & St. J. R. Co., 105 Mo. 270.

Same—Failure of signal as merely evidence of negligence.

(2378) The court instructs the jury that the failure to ring the bell or give other warning of the approach of the train to the crossing, if such failure there was, does not in itself constitute negligence and entitle the plaintiff to recover; but such circumstance can only be considered by you in connection with others as tending to prove negligence on the part of the defendant company.[46]

Same—Sufficiency of evidence of ringing bell.

(2379) The court instructs the jury that it is not necessary, in order to enable the plaintiff to recover, that any witness should swear positively that no bell was rung or whistle sounded upon the train in question at the distance of at least eighty rods from the highway crossing. It is sufficient, upon that question, if the jury believe from all the evidence in the case that no bell was rung or whistle sounded at a distance of at least eighty rods from the crossing.[47]

Same—Frightening team.

(2380) The court instructs the jury that if, however, you do not find that said employe or employes made said noise with the intent to frighten plaintiff's team; and you do not find that they knew or had reason to believe that said noise would frighten said team and probably cause injury to the plaintiff or others in said wagon; then you will find for defendant.[48]

(2381) The court instructs the jury that it is made the duty, by law of railroad companies, to cause the bell on their trains to be rung and the steam whistle to be blown when approaching a public crossing. If in this case you find that the engineer or fireman complained of sounded the whistle or rang the bell, or did both as signals that the train was about to back toward a street or other public crossing;

[46] Approved in Geist v. Missouri Pac. Ry. Co., 62 Neb. 309.

[47] Approved in Illinois Cent. R. Co. v. Slater, 129 Ill. 91.

[48] Approved in Hargis v. St. Louis, A. & T. R. Co., 75 Tex. 19.

and said noise gave fright to the plaintiff's team and caused him to be injured; the fact that said noise frightened the team would not render defendant liable for the injury, unless such engineer or fireman saw and realized, or had reason to know, that such noise would cause fright to the team and result probably in injury.[49]

(2382) The court instructs the jury that, if you believe from the evidence that plaintiff received physical injuries, such as are alleged in the petition, by reason of his team becoming frightened and throwing him to the ground or by dragging him; and you further find that said team became frightened by reason of the noise made by the employes of defendant in blowing the whistle or ringing the bell, or causing steam to escape from an engine of defendant in their charge; and you find from the evidence that said employe or employes of defendant caused such noise for the purpose and with the intention of frightening said team, or knowing or having reason to believe that such noise would frighten said team; then plaintiff would be entitled to recover such sum as actual damages as the evidence may show him entitled to under the instructions hereinafter given.[50]

(2383) The court instructs the jury that, if you find that plaintiff knew or had reason to know that his team was afraid of such engine, and he drove across said railroad in front of the engine; and after he had crossed he had time to get at a safe distance from said engine, and the noise incident to moving the same before said noise was made; but instead of moving on he voluntarily and unnecessarily stopped his team, and whilst so standing said employes, only for the purpose of giving the usual signals to back the train, blew the whistle and rang the bell and caused the escape of steam, or did any of said acts; and plaintiff's team took

[49] Approved in Hargis v. St. Louis, A. & T. R. Co., 75 Tex. 19.
[50] Approved in Hargis v. St. Louis, A. & T. R. Co., 75 Tex. 19.

fright thereat and hurt him; then plaintiff could not recover for such injury.[51]

(2384) The court instructs the jury that maliciously done, means an act done with a desire or purpose to injure. A railroad is not liable, for blowing a whistle and ringing a bell, while exercising this right in a lawful and reasonable manner, for injuries occasioned by horses, when driven upon the highway, taking fright at such noise.[52]

(2385) A railroad company is not liable when an injury results from horses being frightened by the noises or appearance of the train, when due and proper care in the management of the train is used. If the engineer wantonly and maliciously made unnecessary noise for the purpose of scaring the horses, and thereby the injury was brought about in the loss of the horses, defendant would be liable.[53]

Failure of signals and excess of speed.

(2386) The court instructs the jury that, if they find from the evidence that the defendant's servants in charge of the train that injured said plaintiff ———, gave signals by whistling once, and no more, at such distance, if it exceeded 100 rods from ——— street that said plaintiff would naturally think that he could safely cross before the train arrived at G. street if he heard such a whistle, and that he did hear it; and should further find that no bell was rung, and that said train was going at a greater rate of speed than men of ordinary care and prudence in like employment would have run it under like circumstances and conditions; and that said plaintiff, as a reasonable man, was thereby deceived and led to believe that he could cross the tracks of said defendant's railroad in safety; and that, if attempting under these circumstances to cross said tracks, without fault or negligence on his part, he was, on account of carelessness

[51] Approved in Hargis v. St. Louis, A. & T. R. Co., 75 Tex. 19.
[52] Approved in Everett v. Richmond & D. R. Co., 121 N. C. 519.
[53] Approved in Everett v. Richmond & D. R. Co., 121 N. C. 519.

upon the part of the servants of said defendant in operating said train at an unusual and dangerous rate of speed, struck and killed; then plaintiff would be entitled to recover if such carelessness was the sole cause of his injuries.[54]

Necessity for lookout and lights on trains backed across highway.

(2387) The court instructs the jury that it is gross negligence to back a train, without a brakeman at the rear end as a lookout, across the main thoroughfare of a village, when there is no flagman at the crossing, even at a rate but little faster than a person walks.[55]

(2388) The court instructs the jury that, under the ordinance of the city there was no requirement that the engine should have a headlight similar to that usually placed on the front end of engines. The ordinances required either a large lamp, headlight, or lantern, and any one of the three was a compliance therewith.[56]

(2389) The court instructs the jury that, if you believe from the evidence that plaintiff was knocked down, run over and injured on ——— street in the city of ——— by a freight car, cars or locomotive propelled by steam power, which were then and there being backed on the tracks of the defendant within the limits of the said city of ———, without having a man stationed on the top of the car at the end of the train farthest from the engine to give danger signals; and if you further believe from the evidence that, if the defendant had had a man so stationed, such man would, by the exercise of ordinary diligence, have discovered the plaintiff after his position became dangerous, in time

[54] Schweinfurth v. Cleveland, C., C. & St. L. Ry. Co., 60 Ohio, St. 215.

This was held not open to the objection that it makes defendant liable for mistakes or miscalculations of the injured person.

[55] Approved in Florida Cent. & P. R. Co. v. Foxworth, 41 Fla. 1.

[56] Approved in Weller v. Chicago, M. & St. P. Ry. Co., 22 Am. & Eng. Ry. Cas. (N. S.) 61.

to have avoided running over him, by the exercise of ordinary care and promptness on the part of the men in charge of said train; then, even though you may believe that plaintiff was guilty of negligence, yet, such negligence on his part will not prevent his recovering damages in this suit.[57]

(2390) The court instructs the jury that, if you believe from the evidence that an ordinance of the city of ——— required the defendant, when moving any car, cars or locomotives propelled by steam power within the limits of the city, to cause the bell of the engine to be constantly sounded; and when backing any freight car, cars or locomotive propelled by steam power near city limits to have a man stationed on the top of the car at the end of the train farthest from the engine to give danger signals; and further required that no freight train ought at any time to be moved within city limits without being well manned with experienced brakemen at their posts, so stationed as to see the danger signals and hear the signals from the engine; then any neglect or failure by the defendant, its agents, servants or employes, to comply with any or all of the above requirements, was of itself negligence on the part of the defendant; and if you believe from the evidence that, as a result of said negligence or failure on the part of the defendant, its agents, servants or employes, the plaintiff was injured, you will give a verdict in favor of the plaintiff, unless you also find from the evidence that plaintiff was himself guilty of negligence which contributed directly to cause of his injuries.[58]

Flying switches.

(2391) The court instructs the jury that, if they find from the evidence that plaintiff received injuries upon the track

[57] Approved in Dahlstrom v. St. Louis, I. M. & S. R. Co., 108 Mo. 525.

[58] Approved in Dahlstrom v. St. Louis, I. M. & S. R. Co., 108 Mo. 525.

of the defendant company which he was crossing upon a thoroughfare of the village of C., while the defendant company was engaged in transferring a car from the main to the side track by putting the train in motion running towards the switch; and before it was reached and when sufficient momentum to answer the purpose had been acquired, the engine was detached; and the car, by the momentum thus acquired, was to be carried beyond the side track upon the main line; and they further find that the car thus intended to be thrown beyond the side track had a momentum which carried it along said thoroughfare at the rate of five miles per hour; the company was guilty of a degree of negligence from which the company is not excused by the fact,—if the jury find it to be a fact,—that the engineer in charge of the switching rang the bell in response to a signal given him by the conductor of the train, to put the train in motion; if they further find the defendant company, after seeing the plaintiff, or after it should in the exercise of due care have seen the plaintiff on its track, or so near thereto as not to have space to pass clear, failed to exercise all proper means to avoid the accident.[59]

(2392) The court instructs the jury that the defendant had the lawful right to move its cars along and upon its said track, either with or without being propelled or moved by an engine attached thereto; and the mere fact that the cars which ran over and killed deceased were being moved with or without an engine attached thereto, is of itself no evidence of negligence on the part of the defendant's agents, servants or employees in charge of same.[60]

B. *Contributory Negligence.*

Care required in general.

(2393) The court instructs the jury that, if they be-

[59] Approved in Florida Cent. & P. R. Co. v. Foxworth, 41 Fla. 1.
[60] Approved in LeMay v. Missouri & P. R. Co., 105 Mo. 361.

lieve from the evidence that the plaintiff might in the exercise of ordinary care have seen the danger and avoided it, and that he did not do so; and that the omission of deceased to do so contributed to the result; then he was guilty of such negligence as will prevent a recovery, unless the injury was produced by willful or intentional acts of defendant, or its agent.[61]

(2394) The court instructs the jury that the fault or negligence on the part of plaintiff which would preclude him from recovery, if there was negligence both upon his part and upon the part of the company, its agents or employees, is not the least degree of fault or negligence; but it must be such a degree as to amount to a want of ordinary care on his part, under all the circumstances, at the time of the injury.[62]

(2395) The court instructs the jury that, if the injuries complained of were the joint result of plaintiff's carelessness and lack of vigilance for his own safety, and of the failure of defendant's servants in charge of said train to give signals of approach to said crossing, then the verdict must be for the defendant. If both parties were careless, neither can recover from the other on account thereof.[63]

(2396) The court instructs the jury that, if plaintiff failed to exercise that care which the law requires of one going upon or crossing over a railroad track where there are moving trains, and this negligence contributed to his injury, he may not recover, unless defendant had knowledge of plaintiff's perilous position in time to have avoided injuring him by use of ordinary care, and failed to use such care.[64]

(2397) The court instructs the jury that negligence on

[61] Approved in Illinois Cent. R. Co. v. Goddard, 72 Ill. 567.
[62] Texas & N. O. Ry. Co. v. Carr (Tex. Civ. App.) 42 S. W. 126.
[63] Approved in Kenney v. Hannibal & St. J. R. Co., 105 Mo. 270.
[64] Approved in St. Louis, M. & S. Ry. Co. v. Taylor, 64 Ark. 364.

the part of the deceased, which will prevent the plaintiff recovering in this action, must be such as directly contributed to his injury, and consists of the want of ordinary care. Ordinary care means that degree of care which may be reasonably expected of ordinarily prudent persons in the situation of plaintiff's husband at and just before the time the accident occurred; and, in determining whether the deceased was using such care, you should take into consideration all the circumstances surrounding him at the time.[65]

(2398) The court instructs the jury that it was the duty of the plaintiff, in crossing the said track, to use and exercise ordinary care to avoid injury; and if she failed to exercise ordinary care; or in other words, if she was guilty of ordinary negligence which contributed directly or approximately to the alleged injury; then the defendant is not liable for the alleged injuries, even if they were received by her. By ordinary care is meant that degree of care which men in general exercise in respect to their own concerns; and by ordinary negligence is meant the omission or want of that degree of care which men in general exercise in respect to their own concerns. The burden of proof is upon the defendant to show by a preponderance of the evidence that the plaintiff was guilty of contributory negligence. With that exception, the burden of proof is upon the plaintiff to prove her case by a preponderance of the evidence.[66]

(2399) The court instructs the jury that the ordinary care and prudence which the said plaintiff was required to use, as stated in the preceding prayer, were such acts and con-

[65] Approved in Weller v. Chicago, M. & St. P. Ry. Co., 22 Am. & Eng. Ry. Cas. (N. S.) 61.

[66] Approved in St. Louis & S. F. Ry. Co. v. Dawson, 64 Kan. 99.

Instruction held not open to objection that it was liable to leave on the jury the impression that, unless defendants by their evidence established contributory negligence, the defense of such contributory negligence must fail, when construed with all instructions in the case.

duct on her part as would be the natural and ordinary course of prudent and discreet persons under similar circumstances; that is to say, such degree of care as should have been reasonably expected from an ordinarily prudent person in her situation.[67]

Crossing in front of approaching train.

(2400) The court instructs the jury that, if they should find from the evidence that as the vehicle in which the plaintiff was driving approached the crossing in question, the defendant's track was in plain sight, and there was nothing to obstruct the view of plaintiff from seeing the defendant's train for a long distance as it approached the crossing; and if the jury believe from the evidence that the train was lighted with a headlight in front of the engine and with lights in its cars, and could be readily seen from a distance; and that the plaintiff was in such a position on his wagon that he must have seen the train before he reached the crossing; and that when plaintiff tried to cross in front of the train, he must have known that the train was approaching; then the jury are instructed that these facts are to be considered upon the question as to whether plaintiff was guilty of negligence which will preclude a recovery from the defendant.[68]

Care required of persons with team and vehicle.

(2401) The court instructs the jury that, if plaintiff, at the time of his injury, was driving his horse faster than a moderate gait, then the plaintiff cannot recover herein. In determining whether the gait was faster than moderate, the jury have the right to consider that he was approaching a railroad crossing; that two cable trains were waiting for defendant's train to pass, and all the facts and circumstances in evidence, and determine therefrom whether, in view of the

[67] Approved in Baltimore & O. R. Co. v. Owings, 65 Md. 502.

[68] Landon v. Chicago & G. T. R. Co., 92 Ill. App. 216.

place and situation, the gait of the horse was faster than moderate.[69]

(2402) The court instructs the jury that, if plaintiff was aware of the approaching of the train in time to have stopped before reaching the track upon which the train was approaching, and intentionally drove upon the track after being aware of the train, plaintiff cannot recover; and if you believe from the evidence that plaintiff knowing that a train was approaching, in season to take his own course and decide whether to be safe and stop, or to go on and run his chance, chose to go on; he must abide the risk that he took, and your verdict will be for the defendant.[70]

(2403) The court instructs the jury that, if you find from the evidence that plaintiff drove his team across the defendant's railroad at a public crossing, and that an engine of defendant was standing near such crossing; and you further find that plaintiff's team was afraid of such engine and became frightened in crossing in front of said engine; and after crossing said railroad plaintiff voluntarily stopped his team and wagon, and said team became quiet; and the engineer or other employe then blew the whistle and rang the bell as signals to move such engine, believing from plaintiff's act in stopping his team that no injury would arise from such signals or necessary escaping steam; and plaintiff's team took fright and injured him: then defendant would not be liable.[71]

Knowledge of danger.

(2404) The court instructs the jury that the railroad track was in and of itself, a warning of danger. The evidence in this case shows that plaintiff was familiar with this crossing. It was his duty to carefully look for ap-

[69] Approved in Weller v. Chicago, M. & St. P. Ry. Co., 22 Am. & Eng. Ry. Cas. (N. S.) 61.

[70] Wilds v. Hudson River R. Co., 24 N. Y. 430.

[71] Approved in Hargis v. St. Louis, A. & T. R. Co., 75 Tex. 19.

proaching trains, and to exercise reasonable care to see if they were approaching, before going on the crossing. If, by the exercise of such care as ought to be reasonably expected of a man of reasonable care and prudence, he could have discovered the approach of the train before he got to the crossing, then your verdict must be for defendant; and this is so, even though you find that defendant was negligent in some respect submitted.[72]

Reliance on care of railroad company.

(2405) The court further instructs the jury that plaintiff had a right to rely on the performance of the duties of the agents of the defendant by the same, and to suppose that on a frequented crossing within the corporate limits of the town of ———, they would obey the ordinance of said town, both as respects the signals and the speed it prescribes; but such reliance does not excuse plaintiff's intestate, if the jury believe from the evidence that plaintiff contributed to his own injury by his own want of ordinary prudence and care, and such contributory negligence on the part of plaintiff was the immediate and proximate cause of his injury.[73]

Rate of speed of train or disregard of schedule as excuse for want of care.

(2406) The court instructs the jury that the fact that the train was behind time, and was running faster than its usual speed at the crossing to make up time, did not excuse the plaintiff or her father from exercising the care and caution required of them, when the train was on time and running at its usual rate of speed at that crossing.[74]

(2407) The court instructs the jury that defendant had the right to run said train at any rate of speed, and to pass

[72] Approved in Weller v. Chicago, M. & St. P. Ry. Co., 22 Am. & Eng. Ry. Cas. (N. S.) 61.

[73] Baltimore & O. R. Co. v. Few's Ex'r, 94 Va. 82.

[74] Approved in Cincinnati, I., St. L. & C. Ry. Co. v. Howard, 124 Ind. 280.

said crossing either on its card time or earlier or later, at any speed as it or its servants in charge thereof might choose; and plaintiff was not excused from the duty to use ordinary care to ascertain the presence of said train before driving upon said track, by the fact that it was an extra train not running on card time; nor by the fact of its running at any rate of speed shown; nor by any failure to give signals of its approach; nor by all of such facts if found by the jury.[75]

Failure to give signals as excusing want of care.

(2408) The court instructs the jury that the sole purpose for which signals are required to be given by a locomotive as it approaches a public crossing, is to give warning to the public of the approach of the locomotive to said crossing, and to warn the public to keep away from the tracks until the locomotive should have passed over the crossing; and that, if the jury shall find from the evidence that the plaintiff on approaching the crossing described in the declaration, and at which the injury sued for in this case was alleged to have been received, because of a collision with a train running over defendant's tracks, knew that the train was coming and started up his horses as he approached the crossing, attempting to cross before the train had reached the crossing; then the jury are instructed that it was immaterial whether the bell was ringing upon the locomotive or not.[76]

(2409) The court instructs the jury that where a railway company maintains an electric gong at its crossing, as a precaution to protect persons crossing, the traveler is not bound to exercise so high a degree of care as he would, except for such precautions on the part of the company; still he is, nevertheless, bound to use his senses and do all which a prudent man, under the circumstances, would do to avoid the danger.[77]

[75] Approved in Kenney v. Hannibal & St. J. Ry. Co., 105 Mo. 270.
[76] Landon v. Chicago & G. T. R. Co., 92 Ill. App. 216
[77] Approved in Kimball v. Friend, 95 Va. 125.

(2410) The court instructs the jury that, if they believe from the evidence that the plaintiff saw the engine approaching, or knew of its approach before he got upon defendant's track, then the failure of defendant's servants to ring the bell of the engine, if a fact, is immaterial, and plaintiff is not entitled to recover on that ground of negligence.[78]

(2411) The court instructs the jury that, if they believe from the evidence that plaintiff saw the engine approaching, or knew of its approach before he got upon the track; or could have seen such engine by looking; or could have heard it approaching by listening; then the failure of defendant's servants to ring the bell of the engine, if a fact, is immaterial, and plaintiff is not entitled to recover on that ground of negligence.[79]

(2412) The court instructs the jury that it was the duty of plaintiff, while approaching said railroad track and before driving upon the same, to use his eyes and ears, to look and listen for an approaching train; and if the jury believe from the evidence that the plaintiff, if he had so looked and listened, could have thereby seen or heard the train in time to have avoided collision with it and the injuries complained of; then your verdict must be for the defendant, notwithstanding the jury may further believe from the evidence that defendant's servants failed to give signals by bell or whistle of the train's approach.[80]

Care required though gates are not lowered and signals not given.

(2413) The court instructs the jury that, though they may believe from the evidence that an ordinance of the city of ——— required the defendant to have a gate at the ——— street crossing, with a man in charge of the same,

[78] McManamee v. Missouri Pac. Ry. Co., 135 Mo. 440.

[79] Schmitt v. Missouri Pac. Ry. Co., 20 Am. & Eng. Ry. Cas. (N. S.) 216.

[80] Approved in Kenney v. Hannibal & St. J. R. Co., 105 Mo. 270.

and to lower said gates whenever a train attempted to cross said street; and though they may believe from the evidence that the defendant company failed to provide said gatekeeper at the crossing in question, or to have said gate lowered on the occasion of the accident; and though they may believe that the defendant company failed to have at the front of the train, as it approached said crossing, a light, or to signal its approach by bell or otherwise; yet, the said failures on the part of the company did not relieve the plaintiff from exercising care and caution in attempting to avoid injury from the approaching train. It was the duty of said plaintiff, before attempting to cross said track, or while standing on or near said track, to look in both directions, and to listen for approaching trains; and if said plaintiff stepped upon said track without looking and listening, or stood in such close proximity to said track without looking and listening as to be struck by said train; then said plaintiff was guilty of such contributory negligence as precludes any recovery; and the jury must therefore find for the defendant.[81]

Care required of person in vehicle driven by another.

(2414) The court instructs the jury that the rule requiring a traveler on a highway, on approaching a railroad crossing, to have his senses on the alert to discover and avoid danger from an approaching train, is not relaxed in favor of one who is carried in a vehicle owned and driven by another; it is no less the duty of the passenger, where he has the opportunity to do so, than the driver, to learn of danger and avoid it, if practicable; and if the jury believe from the evidence that the plaintiff was seated in a carriage, owned and driven by one ———; that the curtains were up so that the

[81] Approved in Rangeley's Adm'r v. Southern Ry. Co., 95 Va. 715. Need not state duty of railroad company to avoid collision after discovering person, if there is no evidence on which to base it.

plaintiff could see in the direction from which the engine was coming, and that by looking and listening the plaintiff could have discovered the approaching engine in time to avoid it; then they must find for the defendant, even though they may believe that the defendant was negligent, unless the defendant, after discovering the negligence of the plaintiff, could have avoided its consequences.[82]

Disregard of warnings.

(2415) The court instructs the jury that, if they shall believe from the evidence that when the plaintiff was some one hundred and fifty feet away from the crossing, the flagman warned him of the approach of the train, and that he thereupon stopped his team; and that he afterwards started his team toward the crossing; and that when he had got within about fifteen or twenty feet of the crossing, the flagman again warned him and he again stopped; and that afterwards he started again and attempted to drive across the tracks, and in so doing his team was struck by the train; then the plaintiff is not entitled to recover in this action and the verdict of the jury must be for the defendants.[83]

Acts in emergencies.

(2416) The court instructs the jury that it is alleged on the part of the defendants that the duty to stop, to look and to listen, was not performed by the deceased; and that in addition to that, he had not only the chance to have performed his duty in that respect, but that a distinct warning was given to him. You will recollect the testimony of the first witness called, who was the brakeman on the coal train; he called to him to look out! Now, whether plaintiff heard that we have no means of knowing. Whether he did hear it; or, whether hearing it, he was under the impression

[82] Approved in Atlantic & D. R. Co. v. Ironmonger, 95 Va. 625.

[83] Approved in Philadelphia, W. & B. R. Co. & Union R. Co. v. State of Maryland, use of Gunther, 66 Md. 501.

that he would get across, and committed an error of judgment in coming forward; or, whether, having gotten into a difficult position he then was put in a position of having to choose between two evils, and went forward as the least of the two; we are not able to say from any positive testimony. In the latter case, of course, that is an exception to the general rule which I have given you. If a man has got himself, without negligence, into a position of danger, he is not responsible if he makes a mistake in judgment in getting out. A man put under that pressure, if he uses his judgment honestly, is not responsible; although he might have done better, if he had done the other way.[84]

(2417) The court instructs the jury that, if they believe from the evidence that plaintiff, through the negligence of the defendant was in terror of an emergency for which he was not responsible, and for which the defendant was, acted wildly and negligently and lost his life in consequence; said negligent conduct, under such circumstances, is not contributory negligence. In such case, the negligent act of the defendant is the proximate cause of the injury.[85]

Violation of ordinance by injured person.

(2418) The court instructs the jury that any violation of a city ordinance is negligence; and if plaintiff violated the ordinance of the city read in evidence by defendant, and thereby contributed to his injury, then plaintiff cannot recover.[86]

Acts where gates let down.

(2419) The court instructs the jury that it was the plaintiff's duty to place himself on that road, when he found the gates down, in such a position as would enable him to take the best care of himself under the circumstances that he

[84] Approved in Pennsylvania R. Co. v. Werner, 89 Pa. 59.

[85] Baltimore & O. R. Co. v. Few's Ex'r, 94 Va. 82.

[86] Approved in Weller v. Chicago, M. & St. P. Ry. Co., 22 Am. & Eng. Ry. Cas. (N. S.) 61.

could. If he did not take care of his own safety,—if you find from the evidence that he did not,—he was guilty of negligence and he cannot recover, no matter what the negligence of the defendant company had been. The fact that the gates were down was a warning that the train was approaching. Whether they were down nine minutes or less, as that train was approaching the crossing, might have some bearing upon the credibility of the witnesses testifying in this case, or some bearing upon the weight you will give to the testimony of the witnesses of the plaintiff or defendant. The plaintiff's witnesses do say that gate was down for many minutes before the train came to that crossing; whereas, the testimony on the part of the defendant's witnesses put it that it was lowered just before the train came to the crossing.[87]

Injury to intoxicated person.

(2420) The court instructs the jury that, if they believe from the evidence that the deceased, while intoxicated, placed himself, about dark or in the dusk of the evening, on defendant's track running along a public street, where defendant's trains were constantly passing and repassing, and so remained there until run over and killed by the passing engine of defendants; then deceased was guilty of such gross negligence that you should find the defendants not guilty; unless you further believe from the evidence that the agent or agents of defendants willfully caused the death of deceased, or were guilty of such gross neglect on their part as amounts in law to a willful neglect of duty.[88]

(2421) The court instructs the jury that, if they find from the evidence that the defendant owned and operated a railroad in ———, as stated in the first prayer; that on the night of the ——— of ———, 19—, the plaintiff was

[87] Approved in Simmons v. Pennsylvania R. R., 199 Pa. 232.

[88] Approved in Illinois Cent. R. Co. v. Hutchinson, 11 Am. Neg. Cas. 430.

stupidly drunk on his hands and knees on the defendant's track, at or near the crossing thereof over ——— street, and was injured and wounded by a passing train of cars; then the plaintiff is entitled to recover, provided the jury further find that the agents of the defendant in charge of said cars discovered the plaintiff in such dangerous situation, in time to stop said cars and save the plaintiff from injury by the use of ordinary care and caution on the part of such agents in charge of said cars.[89]

Duty to stop, look, and listen.

(2422) The court instructs the jury that the precise thing that every man is bound to do before stepping upon a railroad track, is that which every prudent man would do under like circumstances. If you believe from the evidence that every prudent man would look and listen, so must every one else, or take the consequences, so far as the consequences might have been avoided by that means.[90]

(2423) The court instructs the jury that it is not the exercise of ordinary care and prudence for a person to drive with a horse directly on to a railroad crossing, known to him at the time to be dangerous, without making an effort by stopping or listening, or otherwise, to ascertain whether a train is approaching, or whether it is safe to drive on the track with his team.[91]

(2424) The court instructs the jury that it was the duty of the plaintiff, after his attention had been called to an approaching train, to look and listen for such train at such distance from the crossing as to enable him to ascertain whether or not he could safely pass over the same without collision. And that, if they find that he did not so look and listen, he would be guilty of such contributory negli-

[89] Approved in Baltimore & O. R. Co. v. Kean, 65 Md. 394.
[90] Approved in Broyles v. Priscock, 97 Ga. 643.
[91] Approved in Chicago & N. W. R. Co. v. Hatch, 79 Ill. 137.

gence as would prevent his recovery in this action, provided that such want of care contributed to produce the injury.[92]

(2425) The court instructs the jury that, if they believe from the evidence that the plaintiff was well acquainted with the crossing and the road leading thereto; and further believe that at the point twenty-six feet from the crossing he could have stopped his team; and from that point, if he had looked, could have seen the train approaching, and thus have averted the accident; the verdict must be for defendant.[93]

(2426) The court instructs the jury that the track itself is a warning of danger to those who go upon it; and persons about to cross a railroad track are bound to recognize the danger, and to make use of the sense of hearing as well as of sight,—and if either cannot be rendered available, the obligation to use the other is the stronger,—and ascertain before attempting to cross it whether a train is in dangerous proximity; and if they neglect to do this, but venture blindly or carelessly upon the track, without any effort to ascertain whether a train is approaching; it must be at their own risk. Such conduct is of itself negligence.[94]

(2427) The court instructs the jury that, if you find from the evidence that the plaintiff, knowing the position of the railroad track and that trains were running frequently thereon, approached the crossing without looking in the direction from which the train was coming—and without stopping his team to listen for an approaching train—so quickly that he was unable to stop his horses before going upon the track; and in consequence thereof the collision occurred; the plaintiff cannot recover in this action.[95]

[92] Approved in Grand Trunk Ry. Co. of Canada v. Cobleigh, 24 C. C. A. 342, 78 Fed. 784.

[93] Approved in Kenney v. Hannibal & St. J. R. Co., 105 Mo. 270.

[94] Approved in Thomas v. Chicago & Grand Trunk R. Co., 86 Mich. 496.

[95] Approved in Haines v. Illinois Cent. R. Co., 41 Iowa, 227.

Same—Duty where view obstructed.

(2428) The court instructs the jury that it is the duty of a traveler approaching a crossing on grade over a railroad track to look and listen; and for this purpose it is his duty to stop before crossing the track, if the circumstances are such as to make it necessary to stop in order to properly look and listen; and if the jury believe from the evidence that the plaintiff's intestate was killed by the engine of defendant while attempting to cross the track of said company; and that at the time he was so killed he was riding upon a bicycle, and that he approached the crossing over said tracks through a cut which obstructs the view of the track until the plaintiff got within a reasonably short distance of the track; and that the plaintiff could not, without stopping his bicycle before reaching the crossing, look carefully up and down the track; and if they believe from the evidence that the plaintiff's intestate did not stop when in view of the track and listen and look in both directions; then the jury are instructed that he was guilty of contributory negligence, and cannot recover in this action, though the jury may believe that the defendant may have, also, been guilty of negligence.[96]

(2429) The court instructs the jury that, where the view of the plaintiff on the highway approaching the crossing of the railroad of the defendant is obstructed so that he cannot see an approaching train until within about fifteen feet of the track, greater care should be exercised by the plaintiff than if no such obstruction existed; and in case you find that the view was so obstructed that he could not have seen an approaching train within about fifteen feet of the track, then it would be incumbent upon the plaintiff to use greater care than though there were no obstruction, and he should make a vigilant use of his senses to determine whether there is a present danger in crossing. The question as to whether

[96] Approved in Kimball v. Friend, 95 Va. 125.

he should have stopped and assured himself that there was no danger, is one for you to decide. If you find that he should have stopped and made sure that there was no danger in crossing, and that he did not take this precaution; then you are instructed that the plaintiff cannot recover, and that it is your duty to return a verdict in favor of the defendant.[97]

(2430) The court instructs the jury that, if by reason of darkness and because the headlight of the cable car was directly in front of him, there was difficulty to plaintiff in seeing approaching trains, it was his duty to carefully listen for same; and if, by reason of noise from his moving buggy, his hearing was interfered with; then it became and was his duty to stop his horse, and look and listen for trains. If you find that plaintiff W. did not comply with his duty, as in this instruction defined, then you must return a verdict for defendant, even though you may find that defendant was negligent in some respects submitted.[98]

(2431) The court instructs the jury that it is not sufficient to enable the plaintiff to recover, if it appears that he stopped at a distance of two hundred feet from the crossing, and being then unable, on account of a snow squall, to see the train which he had heard whistle, started his horses and drove at a trot onto the track, without again looking for the train. If, under such circumstances, he drove onto the track and injury ensued, he was guilty of contributory negligence and cannot recover, even though the jury find that the defendant was also negligent in not giving proper signals for the crossing.[99]

(2432) The court instructs the jury that the duty of a person to look and listen before crossing a railroad includes

[97] Approved in St. Louis & S. F. R. Co. v. Brock, 64 Kan. 90.

[98] Approved in Weller v. Chicago, M. & St. P. Ry. Co., 22 Am. & Eng. Ry. Cas. (N. S.) 61.

[99] Approved in Grand Trunk Ry. Co. of Canada v. Cobleigh, 24 C. C. A. 342, 78 Fed. 784.

the duty to do that which will make looking and listening reasonably effective. If there is a permanent obstruction to sight that will make danger invisible, and a transient noise that would make it inaudible, it is negligence to go forward at once from a place of safety to a possible danger. Prudence requires delay until the transient noise has abated, and hearing again becomes efficient for protection. You are instructed that, if the deceased was familiar with the ——— railroad crossing, and drove toward it at a rate of speed such as he was unable to check and stop his vehicle in time to escape a collision with a passing train, after arriving at a point where he must have seen it if he had looked, and where he could have avoided it, he will be guilty of contributory negligence, and the plaintiff cannot recover.[100]

(2433) The court instructs the jury that, if they believe from the evidence that the defendants, at the crossing where the accident occurred, have suffered to remain on their land high embankments on the side of the track or street, so as to exclude to a traveler a view of their track when about to go upon said track, the traveler is excused from looking; and the failure to look cannot be imputed to him as negligence, but it throws upon him additional care in listening, and to take such other precautions for his safety as may be reasonably necessary.[101]

(2434) The court instructs the jury that the general rule that a person in crossing over a railroad track at a public crossing must use his senses as to sight, is subject to the following exception: That where the view of the track is obstructed, and hence, where the injured party, not being able to see, is obliged to act upon his judgment at the time; in other words, where compliance with the rule is impracticable or unavailing.[102]

[100] Approved in Schweinfurth v. Cleveland, C., C. & St. L. Ry. Co., 60 Ohio, 215.

[101] Approved in Kimball v. Friend, 95 Va. 125.

[102] Approved in Kimball v. Friend's Adm'r, 95 Va. 125.

Same—Duty as a continuous one.

(2435) The court instructs the jury that the presence of railroad tracks is a proclamation of danger to any one attempting to cross them; and that it is not only the duty of the person about to cross railroad tracks to vigilantly use his eyes and ears and to look in every direction, and to listen to make sure that the crossing is safe; and that this duty is not performed by plaintiff's looking from a point where the view is obstructed; but the duty is a continuous one, and must be performed at any point before reaching the track; and if the plaintiff fails to perform this duty, and by performing it might have seen the danger in time to avoid it, such failure is contributory negligence on the plaintiff's part, and she cannot recover, notwithstanding the jury may believe from the evidence that the defendant is also guilty of negligence, unless the defendant's agents might, after perceiving the negligence of the plaintiff, have stopped the engine in time to avert the accident.[103]

(2436) The court instructs the jury that simply looking in one direction and making one glance as a man approaches a place of danger, is not sufficient. And that is especially so with the plaintiff in this case, because he was familiar with the surroundings. * * * The duty was continuous upon plaintiff when he started to approach that crossing to be alert and vigilant at all times. That is, a man when he approaches a crossing, does not fulfill the duty by simply giving a casual glance; but when he is approaching a place of danger he must be continually alert to guard against the danger which he apprehends is liable to come upon him. And that duty was insistent and urgent upon this plaintiff at all the times when he was approaching this crossing.[104]

(2437) The court instructs the jury that, if by reason of any miscalculation of plaintiff as to the proximity of a

[103] Atlantic & D. R. Co. v. Ironmonger, 95 Va. 625.

[104] Manley v. New York Cent. & H. R. R. Co., 39 App. Div. 144.

train, he concluded to drive upon the crossing without further efforts to ascertain certainly whether he could safely do so, the verdict must be for the defendant.[105]

Same—Duty to look in different direction.

(2438) The court instructs the jury that a traveler approaching a railroad crossing must look and listen; that it is not sufficient to look in one direction, but that he is under the duty to look in directions from which engines and cars may approach, and that it is his duty to exercise a higher degree of care where the crossing is dangerous, than where it is not; and that if you believe from the evidence that the plaintiff in this case could have seen the engine,—with which he collided,—approaching by looking and so have avoided the collision, the presumption is that he did not look, or, if he did look, did not heed what he saw; and the burden of proof in such case is upon the plaintiff to show that he did look and listen; and if the jury believe from the evidence that he omitted to look and listen, they must find a verdict for the defendant receivers, unless they further believe that, after perceiving the negligence of the plaintiff's intestate, they could have avoided the effect of such negligence by the exercise of ordinary care.[106]

(2439) The court instructs the jury that it is the duty of every person, when going upon or across a railroad track, to look in each direction to see if cars are approaching; and a failure to do so amounts to a want of ordinary care.[107]

Same—Presumption that party stopped, looked, and listened.

(2440) The court instructs the jury that the plaintiff, ————, need not affirmatively prove that he stopped, looked and listened. The presumption is that he did so; and the burden of proof that he did not stop, look and listen, is on

105 Approved in Kenney v. Hannibal & St. J. R. Co., 105 Mo. 270.
106 Approved in Kimball v. Friend, 95 Va. 125.
107 Approved in Illinois Cent. R. Co. v. Goddard, 72 Ill. 567.

the defendant railway company, and must be proved by a preponderance of the testimony on its part.[108]

Evidence of care on part of injured person.

(2441) The court instructs the jury that, in determining the question of plaintiff's conduct before and at the time she approached the crossing, you may consider the evidence as to the locality and obstructions, if there were such, which obstructed or interfered with plaintiff's view, or prevented her from seeing an approaching train; also anything, if there was such, which interfered with her hearing the noise made by a train in motion; also the failure of defendants, if that be true, to sound the whistle and ring the bell as required by statute.[109]

(2442) The court instructs the jury that, where a person has been killed at a railroad crossing, and there are no witnesses to the accident, the circumstances must be such as to show that the deceased exercised proper care for his own safety. Where the circumstances point just as much to negligence on his part as to its absence, or point in neither direction, a recovery cannot be had against the railroad company.[110]

Presumptions and burden of proof of contributory negligence and its absence.

(2443) The court instructs the jury that, while the court says in instruction given at plaintiff's request that the burden of proof is upon defendant to prove negligence on plaintiff's part, yet that does not mean that it must be proven directly by witnesses offered by the defendant. The court only means that, from all the facts and circumstances in ev-

[108] Steele v. Northern Pac. Ry. Co., 21 Wash. 287.

This instruction is applicable in states where contributory negligence is a defense.

[109] Approved in Louisville & N. R. Co. v. Williams, 20 Ind. App. 576.

[110] Smedis v. Brooklyn & R. B. R. Co., 88 N. Y. 13.

idence, whether shown by witnesses for plaintiff or defendant, you must find from the greater weight of the testimony that there was such negligence.[111]

(2444) The court instructs the jury that the plaintiff's decedent is presumed to have exercised due and proper care at the time he was killed, and that the burden of proving that he was negligent is upon the defendant.[112]

(2445) The court instructs the jury that the burden of proving contributory negligence rests upon the defendant. From this, however, it must not be inferred that it devolves upon the defendant to introduce upon its part independent witnesses to give testimony tending to show such facts, if they exist; but the defendant may rely upon the facts, and necessary inferences from the facts, elicited from plaintiffs' witnesses as well as its own.[113]

(2446) The court instructs the jury that the burden is on the plaintiff to show, by a preponderance of the evidence, that she and her father vigilantly used their eyes and ears to ascertain if a train of cars was approaching, and if this has not been shown to you by a preponderance of the evidence, the plaintiff cannot recover.[114]

(2447) The court instructs the jury that, when a person crossing a railroad track is injured by collision with a train, the fault is prima facie her own; and she must show affirmatively that her fault or negligence did not contribute to the injury before she is entitled to recover for such injury.[115]

111 Approved in Weller v. Chicago, M. & St. P. Ry. Co., 22 Am. & Eng. Ry. Cas. (N. S.) 61.

112 Baltimore & O. R. Co. v. Few's Ex'r, 94 Va. 82.

113 Approved in Schmitt v. Missouri Pac. Ry. Co., 20 Am. & Eng. Ry. Cas. (N. S.) 216.

114 Approved in Cincinnati, I., St. L. & C. Ry. Co. v. Howard, 124 Ind. 280.

115 Approved in Cincinnati, I., St. L. & C. Ry. Co. v. Howard, 124 Ind. 280.

Injury avoidable notwithstanding contributory negligence.

(2448) The court instructs the jury that mere negligence, or want of ordinary care or caution upon the part of plaintiff, will not prevent his recovery in this case, unless it was such that, but for that negligence, or want of ordinary care and caution the misfortune could not have happened; nor if the defendant might, by the exercise of care on its part, have avoided the consequence of plaintiff's neglect or carelessness.[116]

(2449) The court further instructs the jury that it was the duty of plaintiff on approaching the crossing, before going upon the track or attempting to cross it, to use his eyes and ears for the purpose of avoiding danger; and if the jury believe from the evidence that the plaintiff neglected to look and listen, and attempted to cross the track in front of a rapidly moving train, in full view and hearing, and was injured in so doing; and that his own act or his negligence was the proximate and immediate cause of his death, or contributed to it; they should find for defendant, providing the jury further believe from the evidence that after plaintiff's intestate was seen by the defendant's servants in charge of the train—which injured plaintiff—to be in a position of danger, or that said servants might by due diligence have seen plaintiff; the said defendant's servants could not by the exercise of due diligence have stopped the train or otherwise prevented the accident.[117]

(2450) The court instructs the jury that plaintiff ought not to recover in this case, unless they find from the evidence that the servants and agents of defendant in charge of the engine saw, or by the exercise of ordinary care and diligence might have seen, plaintiff on the track in time to have stopped the train and thus averted the injury. The jury are also instructed that if, after deceased entered upon

[116] Baltimore & O. R. Co. v. Few's Ex'r, 94 Va. 82.

[117] Approved in Baltimore & O. R. Co. v. Few's Ex'r, 94 Va. 82.

the railroad track, the employees in charge of the train which struck him did not have time by the exercise of ordinary diligence to stop the train; then no negligence can be imputed to defendant company because they did not do so, and the verdict should be for the defendant.[118]

III. Injuries to Persons on or Near Track.

Use of right of way for foot path.

(2451) The court instructs the jury that, although the plaintiff had a legal right to walk across the railroad track of the defendants where the same crosses a public highway; still, if the jury believe from the evidence that at the time of his receiving the injury, he went upon said track outside of the boundary of a public highway, and walked along said track to such highway, and thereupon continued to walk along and upon said track within the boundary of such highway, with the intention of continuing to walk along and upon said track, across said highway, to and along the said track without and beyond the boundary of such highway; and that such highway was unobstructed on either side of said track, so that he might have crossed said highway as well without walking upon said track; such facts are evidence for the jury to consider, and from which they may find that said plaintiff was guilty of negligence in attempting to cross said highway, upon and along said track; and if the jury further find from the evidence such negligence on the part of said plaintiff, and that, by means of such negligence, he was run against by a car of the defendants and thereby received the injury, the jury should find for the defendants.[119]

(2452) The court instructs the jury that every person of ordinary intelligence is bound to know that a crossing

[118] Approved in Schmitt v. Missouri Pac. Ry. Co., 20 Am. & Eng. Ry. Cas. (N. S.) 216.

[119] Approved in Illinois Cent. R. Co. v. Baches, 55 Ill. 379.

of railroad track over a public highway, when cars are frequently passing, is a place of more than ordinary danger; and it becomes his legal duty at such place to use corresponding care and caution to avoid injury; and while it is true that the public have a right to be upon a railroad track at the crossing of a public highway, for the purpose of crossing over such track, it is the duty of all persons crossing over such track to do so with all convenient dispatch; and if the jury believe from the evidence that in this case the plaintiff was upon the track of the defendants' railroad, not for the purpose of crossing over the same, but for the purpose of employing the same as a foot path from his place of labor to his residence, it was negligence on his part to employ such railroad track for such a purpose, even though the jury should believe from the evidence that at the time he was so injured by defendants' cars, he had actually proceeded to and arrived at a point within the boundaries of a public highway.[120]

(2453) The court instructs the jury that, if they believe from the evidence that the plaintiff and others were in the habit of using the track of defendant's railway next to the M. river, and on which plaintiff's husband was at the time he was killed, in towing said boat up the river; and had been in the habit of doing so, continually, for a long time prior to the day in question, without objection or protest on the part of defendant or under such circumstances, when by the exercise of ordinary care it might have been known that they were using said track; and that from the nature of the ground rising between said track and the M. river, there was no other place where those towing boats up the river could reasonably be expected to go; then the court instructs the jury that the plaintiff was not a trespasser in being upon said track at the time he was run against.[121]

[120] Approved in Illinois Cent. R. Co. v. Baches, 55 Ill. 379.

[121] Approved in LeMay v. Missouri & P. R. Co., 105 Mo. 361.

(2454) The court instructs the jury that they are the triers of the fact as to whether or not D. was a licensee on the defendant's right of way. If the jury believe from the evidence that the deceased, D., when he received his injuries was traveling along the foot path or way over defendant's land, which had been long used as a walk way leading to a crossing over defendant's track by himself and certain other individuals, occupants of an adjoining lot or close, or by the general public, with the knowledge of the defendant company and without any objection on its part; then the jury must find that said D. was not a trespasser while traveling said path, but that he was a licensee and not wrongfully traveling said path.[122]

(2455) The court instructs the jury that the railroad tracks and right of way of the defendant, at and about where the accident complained of is shown by the pleadings and evidence to have happened, was the property of the defendant; and if the jury shall find from the evidence that a pathway to either side of the defendant's said tracks had been made by persons traveling the same; and shall further find that said pathway continued across said tracks, and that persons had used the same as a near approach to the store building and station used by defendant for 25 years or more, and with knowledge of and without objection from the defendant or its agents; that such user by persons, however numerous and for however long a time, conferred no right upon the plaintiffs or other persons to use such pathway across said tracks, and imposes upon the defendant and its servants no duty to exercise greater care in the management and running of its trains at such pathway, than at other points on or along its road where there were no established crossings.[123]

[122] Norfolk & W. R. Co. v. DeBoard's Adm'r, 91 Va. 700.

[123] Approved in Baltimore & O. R. Co. v. Owings, 65 Md. 502.

Same—Duty of engineer knowing of use of right of way by pedestrians.

(2456) The court instructs the jury that, if they believe from the evidence that at the point on the track of the defendant where plaintiff's husband was killed, said track was clear and unobstructed and sufficiently straight to permit a plain view along the track from any approaching train; and if the jury believe further, that at said point where said deceased was struck by the train the roadbed of the defendant, both east and west of said spot, was at that time used, and had for a long period of time prior thereto been used, with the knowledge of the defendant, its servants and employees, by pedestrians as a passway leading to and from the village of ———; then it was the duty of the employees of the defendant in charge of the train, when approaching such portion of the roadbed of defendant as was used as aforesaid as a passway, to keep a lookout for persons and to ascertain that the track was clear.[124]

(2457) The court instructs the jury that, if they shall believe from the evidence that the place on defendant's track where plaintiff was struck by defendant's train was near a private crossing on defendant's track, used as a private or farm crossing over said track; and that the track, at the time, was in such a condition and position for a distance of eight hundred feet or more west from the point of the catastrophe that a person walking thereon could have been seen by the persons in charge of said train, had they been at their proper posts, and on the lookout ahead of them; and that said track at the place where plaintiff was injured, and for some distance west thereof had, for years prior thereto, and was at about the time said plaintiff was struck, frequently used by pedestrians in going to and from ——— and the ——— crossing, and points be-

[124] Approved in Morgan v. Wabash Ry. Co., 159 Mo. 262.

tween the said places; and that plaintiff, while walking upon defendant's track, became in imminent peril of being struck by defendant's train, and defendant's employees in charge of said train became aware of his peril of being struck in time to have enabled them by the exercise of ordinary care to have stopped said train and averted the injury to said plaintiff, and they failed to exercise such care and stop said train; and that by reason of such failure to exercise such ordinary care the said train was not stopped, and said plaintiff was struck; then the jury must find for the plaintiff, though the jury may find that the plaintiff was guilty of negligence in walking on defendant's track at the time. And by ordinary care, is meant such care as an ordinarily careful and prudent person would exercise under the same or similar circumstances.[125]

Duties of company where tracks are numerous and district frequented by public.

(2458) The court instructs the jury that the degree of care to be exercised by a railroad company must necessarily depend upon the location of the track and the circumstances of the case. In a place not frequented by the public, either by right or permission, expressed or implied, of the company, and in locations where the people are not constantly passing about, and where they cannot reasonably be expected to be, persons in charge of a train are not required by law to be on the lookout for them. In such cases, the company is entitled to the exclusive use of the track; and the persons in charge of the train are only required to avoid injury to them, if they can do so upon becoming aware of their peril. But when the place is within the city limits, in the yard of a company, or yard used by several companies together, or with tracks in close proximity to each other, and employees of companies whose tracks are in close proximity are engaged in the discharge of their duties, the safety of

[125] Approved in Morgan v. Wabash Ry. Co., 159 Mo. 262.

human life requires a different rule; and in this case, if you find that deceased was an employee of one of said roads, in the line of his duty; and the employees of defendant were not on the lookout for such persons, and had their engine in possession or under the control of an incompetent person, if it was; and were running at a dangerous and unlawful rate of speed, if it was; and the injury was inflicted by reason of the want of proper care on the part of the defendant, if it was; the defendant would be guilty of negligence.[126]

Duty as to children on track.

(2459) The court instructs the jury that it was the duty of the engineer to have made an effort to check the speed of his engine as soon as the train reached a point on the track when, by looking, he could have seen the child. It is not material in this case whether the engineer actually saw the child on the track or not. If, in the exercise of ordinary care, by looking ahead he could have seen the child in time, without injury to his passengers, to have stopped the train before he ran over it, and failed to do so, the defendant company was negligent. Therefore, if the jury shall find as a fact from the evidence that the engineer, in the exercise of ordinary care, by looking ahead could have seen the child, and, without injury to his passengers, stopped the train before he struck it; and that he failed to stop the train, thinking that the child would get off the track, or be taken off before he got to it, and so ran over it, the company would be negligent, and the jury should answer the first issue "Yes."[127]

(2460) The court instructs the jury that, according to the law of ———, it is the duty of the engineer and fire-

[126] Approved in McMarshall v. Chicago, R. I. & P. Ry. Co., 80 Iowa, 757.

[127] Approved in Jeffries v. Seaboard A. L. R. Co., 23 Am. & Eng. Ry. Cas. (N. S.) 339.

man on an engine to keep a constant lookout ahead for children that may trespass on the railroad track, so as to avoid injury to them if possible; and if they neglect to do so, the railroad company employing them is liable for any injury caused by their failure to keep such lookout.[128]

(2461) The court instructs the jury that, if they find from the evidence that the B. & O. R. Co. are the owners of the railroad track or tracks, and of certain cars and engines used thereon at ———, in the city of B., along which track or tracks said cars and engines were drawn or propelled for the purpose and about the business of the said railroad company then in the employment, use and management of said cars and engines, the said company is bound to exercise the utmost care and diligence which it was within their means and power to employ to prevent accidents endangering the life or health of the people and inhabitants of said city; and if the jury find that the child of the plaintiff's cestui que use was run over and killed by the defendant's cars as described by the witnesses; and that if the defendants, in the use and management of their cars and engines had exercised the highest degree of care and diligence which it was within their means and power to employ, the said accident could have been prevented; then plaintiff is entitled to recover under this count; but, although the jury may find that the said accident could have been prevented by the use of such care and diligence on the part of the defendants, yet, the plaintiff is not entitled to recover, if the jury believe the accident could have been avoided by the exercise of that degree of care by the said child which was under all the circumstances to be naturally and reasonably expected from one of the said boy's age and intelligence.[129]

[128] Approved in Davidson v. Pittsburg, C., C. & St. L. Ry. Co., 41 W. Va. 407.

[129] Approved in State of Maryland, use of Coughlan v. Baltimore

Injuries to persons on station platform.

(2462) The court instructs the jury that, if they believe from the evidence that at the time of the alleged injury to the plaintiff, said plaintiff was legally and rightfully upon the passenger platform of the defendant at ———, for the purpose of ascertaining the time of departure of a train; and while passing along on said platform the agents or servants of the defendant, without any notice or warning to passengers, threw out of a box car on the said passenger platform a large and heavy stick of timber which struck plaintiff on his forehead, and knocked said plaintiff down and seriously injured him; and if they further find from the testimony that said plaintiff at that time was using ordinary care, and did not cause the infliction of said alleged injury by his negligence, and that the agents of the defendant did not use reasonable care in discharging said timber; then the defendant is liable in this case for whatever injury resulted to the plaintiff from said alleged injury, not to exceed the sum claimed in the declaration in the case.[130]

Injuries to persons unloading cars.

(2463) The court instructs the jury that the term "negligence," as used in this case, means a failure by defendant to perform some legal duty it owed to the deceased at the time of the accident. It was the defendant's duty, when it determined to move the car on which the deceased was working and switch it back to the place where it originally stood, if the defendant's agents who had charge of and performed that work knew that deceased was standing on the car during the operation, to do the switching with such care and prudence as a reasonably careful and prudent man would exercise under the circumstances. It must be assumed that it was necessary to use some speed and force,

& O. R. Co., 24 Md. 84; Baltimore & O. R. Co. v. State of Maryland, use of Coughlan, Id.

[130] Approved in Toledo, W. & W. R. Co. v. Maine, 67 Ill. 298.

or the result would not be accomplished. The defendant had the right to run against stone cars with sufficient speed and force to move them into their proper positions. In doing so, the defendant was performing an act necessary to be performed in the usual course of its business; and the deceased boy, when he chose to remain on the car during the operation, is chargeable with knowledge that the defendant would and must use such speed and force in running and switching the cars as was reasonably necessary for that purpose, and to have taken the chances of any accident which might result from the use of that amount of speed and force. The use of such speed and force as were reasonably necessary under the circumstances to switch the cars, was lawful, and the defendant was not negligent in using it. And if the defendant ran its engine and connecting cars against the stone cars with unnecessary speed and force, the employment of such unnecessary speed and force was a negligent act, and constituted negligence, as charged in the first and third counts of plaintiff's declaration. The question, then, upon this branch of the case for you to determine is, did the defendant use unnecessary force and speed under the circumstances in running its engine and connecting cars against the stone cars, upon one of which the deceased was standing at the time of the accident? This is a material proposition in the case; and I submit it to you as a question of fact, to be determined from the evidence bearing upon that subject.[131]

Injuries by collision with slack car.

(2464) The court instructs the jury that, if they believe from the evidence in this case that the servants of the defendant discovered the slack car, by which the deceased was killed, in motion, and discovered that a collision was probable, in time to have stopped their train and prevented such

[131] Approved in Dolson v. Lake Shore & M. S. Ry. Co., 23 Am. & Eng. Ry. Cas. (N. S.) 387.

collision by the exercise of proper precautions and ordinary care and diligence; and if the jury believe from the evidence that the defendant's servants did not use such precautions, and exercise such care and diligence; and that the want of such precautions, care and diligence caused the death of, (here insert the name of deceased), while he was in the exercise of due care and caution for his own safety; then they should find the defendant guilty, and assess the plaintiff's damages in such sum, if any, as they believe the evidence warrants.[132]

Injury to employe of another company—Whether employe or trespasser.

(2465) The court instructs the jury that, if you find from the evidence that the deceased and other employees of the ——— Railway Company had, for a considerable time prior to the accident, been accustomed to use the track of the defendant railroad company at and near the place where the accident occurred, for the purpose of giving signals by the acquiescence of the company, then the deceased was not a trespasser upon the track; and such permission may be implied if the deceased and other employees of said ——— Railway Company were in the habit of so using the railroad of defendant without objections on its part; and it is for you to determine, from all the facts in evidence before you, whether or not deceased had such permission.[133]

Duties as to lights on rear of trains backing into station.

(2466) The court instructs the jury that, if the train was backing under the shed without displaying the light from the front end of the leading car and without having a flagman stationed thereon; and was backing without due care, and the intestate knew it and placed himself in a po-

[132] Chicago & A. R. Co. v. Anderson, 166 Ill. 572.

[133] Approved in McMarshall v. Chicago, R. I. & P. Ry. Co., 80 Iowa, 757.

sition of danger; his negligence was the proximate cause of the injury,—he had the last chance to avoid the injury,—and this being so, he, and not the defendant, would be responsible for his death. On the contrary, if plaintiff was standing on or near the track, he was not called upon to look out for a backing train which displayed no light and had no flagman,—if you should so find,—on the front of the leading car; for it was the duty of the defendant, as before explained, to display the light and have a flagman at his post, he not being bound to expect a violation of duty. If, therefore, plaintiff was standing on or near the track, and the defendant backed its train under the shed without the light on the front end of the leading car, or in a conspicuous place thereon, or without a flagman thereon; and if the jury should further find that plaintiff did not discover the train in time to escape; then the defendant was negligent, and such negligence was the cause of the injury.[134]

Duty of care on discovery of person negligently in a perilous position.

(2467) The court instructs the jury that, while it may have been the duty of defendant's servants or agents to make all reasonable efforts to stop the train and avoid a collision, yet a duty also devolved upon the deceased; and if, after he saw the train coming, or might by looking or listening have seen or heard it coming, he could have gotten out of its way, or kept out of its way, but did not; then the plaintiffs cannot recover, unless you should further find from the evidence that after the deceased was in a position of peril the defendant's servants in charge of said train either saw him, or by the exercise of ordinary care might have seen him, in time to have stopped the train by the exercise of ordinary care before it struck him. Although the jury may believe from the evidence that defendant's employees were guilty of negligence in failing to discover the presence

[134] Approved in Purnell v. Raleigh & G. R. Co., 122 N. C. 832.

of plaintiffs' son, ———, on the track; yet, if they also believe from the evidence that said plaintiff's son was negligent in failing to discover the approach of defendant's train in time to have kept out of its way, or to have gotten out of its way, if in it; then your verdict will be for the defendant, unless you should further find from the evidence that after the deceased was in a position of peril, the defendant's servants in charge of said train either saw him, or by the exercise of ordinary care might have seen him, in time to have stopped the train by the exercise of ordinary care before it struck him. The court instructs the jury that, if they believe from the evidence that the death of plaintiff's son, ———, was the result of mere accident or casualty, and not of negligence on the part of the defendant, your verdict will be for the defendant.[135]

(2468) The court instructs the jury that, if the plaintiff under all the evidence of this case was in a position of evident peril, from which ordinary care on her part would not save her; and defendant saw her, or could have seen her position by keeping a proper lookout, in time to have warned her or stopped its train and saved her; under those circumstances it was the duty of the engineer to stop the train in time to have avoided the injury; and if he did not do it, then you should answer the first issue "Yes," if this was the proximate cause of this woman's injury.[136]

(2469) The court instructs the jury that defendant is liable in this case, only if its servants failed to exercise ordinary care to prevent the injury, after they became aware of the danger to which deceased was exposed; or, after they might have become aware thereof by the exercise of ordinary care; and by ordinary care is meant such care as would

[135] Approved in Schmitt v. Missouri Pac. Ry. Co., 20 Am. & Eng. Ry. Cas. (N. S.) 216.

[136] Approved in McCall v. Southern Ry. Co., 23 Am. & Eng. Ry. Cas. (N. S.) 760.

be ordinarily used by prudent persons performing a like service under similar circumstances.[137]

(2470) The court instructs the jury that unless they are satisfied from the evidence that the person or persons in charge of the extra passenger train failed to stop the train as soon as a prudent man of the requisite skill and in the exercise of ordinary care would have done under the circumstances; and unless they further believe that ———'s death was caused by that failure; they will find for the defendant.[138]

(2471) The court instructs the jury that, if they further believe from the evidence that the engineer in control of the extra passenger train was keeping the proper lookout which it was his duty to keep; that he saw the hand car as soon as it could be seen under the circumstances, and applied all the means within his power as quickly as they could be applied under the circumstances; and that he continued to use all the means within his power which a prudent man with the requisite skill and in the use of ordinary care would have used under the circumstances; and that the appliances for stopping and controlling the train were in good order: then they will find for the defendant.[139]

(2472) The court instructs the jury that, even if the plaintiff's decedent ——— was in the position of a trespasser on the defendant's property, it was the defendant's duty to exercise ordinary care to avoid injury to him. Therefore, if the jury believe from all the evidence in this case that the engineer or fireman on the engine (mentioned in evidence) did see the handcar (mentioned in evidence) on which the said ——— was riding in time to stop the engine and avert the accident, it was their duty to stop the

[137] Approved in Rine v. Chicago & A. R. Co., 88 Mo. 392.

[138] Approved in Davidson v. Pittsburg, C., C. & St. L. Ry. Co., 41 W. Va. 407.

[139] Approved in Davidson v. Pittsburg, C., C. & St. L. Ry. Co., 41 W. Va. 407.

engine as soon as possible; and if they could have stopped in time to avoid injury to him by the exercise of ordinary care, and neglected to do so, the defendant is liable, and the jury should find for the plaintiff.[140]

Injuries to one going on track to save team.

(2473) The court instructs the jury that, if they believe from the evidence that the horse in charge of the deceased M. was attached to a wagon, and was standing on the levee at the time of the accident without being fastened or so guarded as to prevent its running away; and that said horse ran away and deceased was injured in consequence of its not being fastened or guarded; they will find their verdict for the defendant.[141]

(2474) The court instructs the jury that, although they find from the evidence that M. went on defendant's track to attempt to remove his horse therefrom, and that in doing so he was not exercising ordinary care; yet if the jury find further from the evidence that defendant's servants in charge of its engine and train either saw said deceased upon defendant's track or near same, and in danger of injury from defendant's engine, or by the exercise of ordinary care could so have seen said deceased upon said track and in danger of injury, and by the exercise of ordinary care after so seeing said deceased in such danger, could have averted injury to said deceased; and yet neglected to do so, and in consequence of which deceased was killed: then plaintiff is entitled to recover five thousand dollars.[142]

Injuries to person on bridge.

(2475) The court instructs the jury that the plaintiff alleges in her petition and claims on this trial that the deceased was not down on the cap of one of the bents of the bridge, but was somewhere on the top of the bridge on the ties at the time. She claims that the cars struck him and

[140] Approved in Davidson v. Pittsburg, C., C. & St. L. Ry. Co., 41 W. Va. 407.

[141] McManamee v. Missouri Pac. Ry. Co., 135 Mo. 440.

[142] McManamee v. Missouri Pac. Ry. Co., 135 Mo. 440.

knocked him off the bridge, causing his injuries and death. While, on the other hand, the defendant claims that the deceased was down on one of the caps about two and one-half feet below the track in a position not to be seen by the engineer, and was not seen by him in time to stop the train before reaching the bridge, and that the deceased fell off said bridge, thereby receiving the alleged injury. If the jury believe that the evidence sustains the correctness of defendant's theory, that the injury was caused by falling off the bridge, plaintiff cannot recover, provided such falling off was not caused by the negligent acts of defendant.[143]

Contributory negligence.

(2476) The court instructs the jury that, on the other hand, it was the duty of plaintiff, in attempting to walk upon defendant's track, to have exercised that degree of care and prudence that an ordinarily careful and prudent person of his age and intelligence, under like circumstances, would have exercised; and a failure to exercise such a degree of care and prudence, would render him guilty of negligence.[144]

(2477) The court instructs the jury that, while it may have been the duty of defendant's servant to make all reasonable efforts to stop the train and avoid the collision, yet the like duty devolved upon the plaintiff; and if, after he saw the train coming, or might by looking and listening have seen it coming, he could have gotten out of its way, or kept out of its way, but did not, then the plaintiff can not recover; and even should the jury believe that the deceased's horse and wagon were exposed to a collision with defendant's train, this would not excuse or justify him precipitating himself in front of the train; and if you find he did so in order to save his said horse and buggy, then your verdict must be for the defendant.[145]

[143] McMillan v. Burlington & M. R. Co., 46 Iowa, 231.

[144] Approved in Schmitt v. Missouri Pac. Ry. Co., 20 Am. & Eng. Ry. Cas. (N. S.) 216.

[145] McManamee v. Missouri Pac. Ry. Co., 135 Mo. 440

(2478) The court instructs the jury that, if they believe from the evidence that the injury and death of plaintiff's intestate was due to the failure of deceased to look back while on the track, and the failure of the servants of defendant to keep a proper lookout ahead; and that both these causes combined caused the death of plaintiff's intestate; then it is the duty of the jury to find a verdict for the defendant.[146]

Same—Duty of person with defective hearing.

(2479) The court instructs the jury that, if the deceased was hard of hearing and walked on the defendant's track without looking back, or having looked back, still continued to walk on the track; such conduct on his part was gross negligence, and makes out a case of contributory negligence against him which will defeat all rights of recovery in this action, unless it is made to appear to the satisfaction of the jury that at and about the time of the near approach of the train, he used due diligence and care to extricate himself from the peril in which he had placed himself by his own voluntary act.[147]

Right of jury to consider surroundings of accident.

(2480) The court instructs the jury that, in determining the question as to whether the defendant's servants and employees were guilty of negligence in the present case, the jury are authorized to and should take into consideration the place at which the accident occurred; the manner in which the trains were being propelled; the number of dwelling houses in that vicinity; their distance from the track; and the probability of pedestrians being on the track at that time and place, if any. What would be ordinary care and prudence in running a train of cars in a sparsely populated locality, might be negligence in a more populous dis-

[146] Approved in Frazer v. South & North Ala. R. Co., 81 Ala. 185.

[147] Approved in Frazer v. South & North Ala. R. Co., 81 Ala. 185.

trict; and it is for the jury to determine, in view of all the facts and circumstances of the case, whether defendant's servants did exercise ordinary care and prudence in the management of said train at the time and place mentioned in the evidence in this case.[148]

Burden of proof of negligence.

(2481) The court instructs the jury that, as to the question of negligence upon the part of that person or those persons in control of the extra passenger train mentioned in the evidence,—negligence may be defined as a failure to discharge the duty of taking ordinary care to the injury of one to whom the duty is due, such failure being the direct and proximate cause of the injury; that ordinary care is such as a prudent man of the requisite skill will take under the circumstances of the particular case; and that the plaintiff must show by a preponderance of evidence such failure upon the part of the person or persons in charge of the extra passenger train, before the defendant can be held liable for the acts or omissions of such person or persons.[149]

IV. Injuries to Animals.

Defective fences and cattle guards.

(2482) The court instructs the jury that, if they believe from the evidence that the defendant built and kept in repair a good and sufficient fence at the place in plaintiff's pasture where the horses of plaintiff are alleged to have gone on to the track, and for the killing of which this suit is brought, then they will find for the defendant.[150]

(2483) The court instructs the jury that, if they believe from the evidence that the defendant did not build a fence, and maintain along the line of the railroad through the land

[148] Approved in Schmitt v. Missouri Pac. Ry. Co., 20 Am. & Eng. Ry. Cas. (N. S.) 219.

[149] Approved in Davidson v. Pittsburg, C., C. & St. L. Ry. Co., 41 W. Va. 407.

[150] Approved in Illinois Cent. R. Co. v. Swearingen, 47 Ill. 206.

of the plaintiff, suitable and sufficient to prevent cattle, horses, sheep and hogs from getting on the track of the railroad; and if they further believe from the evidence that the plaintiff's horses got on the track by means of the insufficiency of the fence, and were killed by defendant's train on the track; then the jury should find for the plaintiff so much as they believe from the evidence the horses so killed were worth.[151]

(2484) The court instructs the jury that, if they believe from the evidence that the stock of plaintiff described in the declaration got upon defendant's road at the point described in the declaration, then it was the duty of defendant to fence the road at such point; and if the jury believe from the evidence that the road was not fenced at such point, or that the fence was in such a bad condition that it would not turn stock; and in consequence of the failure to fence at such point, or in consequence of the insufficient condition of such fence at such point, plaintiff's stock was killed and wounded; then the jury should find for plaintiff, and assess his damages at the amount proved.[152]

(2485) The court instructs the jury that, in a township where hogs are by law prohibited from running at large, it is the duty of those who keep hogs in a field or open to enclose them with such a fence or bar as will prevent their escape. If, in such township they have escaped by breaking through or getting over the fence with which they are enclosed, such escape will be presumed to have been by reason of the fault or negligence of the person assuming to keep them, unless it is proven that such fence was so constructed and kept in repair that such breaking through or getting over could not have been reasonably anticipated from the condi-

[151] Approved in Illinois Cent. R. Co. v. Swearingen, 47 Ill. 206.

[152] Illinois Cent. R. Co. v. Whalen, 42 Ill. 396.

Whether it was the duty of the railroad company to fence its track at a certain specified place, is a question of law to be decided by the court.

tion of the fence and the size, activity, natural inclinations and known character of the hogs so escaped.[153]

Same—Liability under statute requiring a railroad company, operating its road for six months, to fence its road.

(2486) The court instructs the jury that, if they are satisfied from the evidence that the defendant's road had been in operation for six months prior to the alleged killing of plaintiff's horse by the defendant's engine; and if the jury believe from the evidence that defendant had erected a fence on the side of the track where the plaintiff's horse got upon the track; then it was the duty of the defendant to maintain such fence; and if the defendant unreasonably neglected to keep said fence in good repair, and by means of said neglect the plaintiff's horse strayed and got upon the track of the defendant and was killed; then plaintiff is entitled to a verdict.[154]

Same—Location of fence—Injuries to crops of ajoining landowner.

(2487) The court instructs you that it is not necessary that the defendant should have erected its fence upon the line of its way. It had the right to locate the fence at any place between the edge of its track and the line of its right of way. Therefore, if you should believe from the evidence that there was a strip of ground between the railroad fence and the plaintiff's fence, and that a part of the same was included within the line of the railroad right of way, but outside of the railroad fence; and that such strip of ground opened at the south end upon a public highway, and that hogs passed through or over said strip of ground, and thence under or through the plaintiff's fence; and even, although in passing over said strip of ground they may have passed over the uninclosed portion of the right of way; still, that

[153] Approved in Leavenworth, T. & S. W. R. Co. v. Forbes, 37 Kan. 445.

[154] Toledo, P. & W. Ry. Co. v. Miller, 45 Ill. 42.

does not entitle the plaintiff to recover; and under such circumstances, if you so find, your verdict should be for defendant.[155]

(2488) The court instructs the jury that, even if you believe from the evidence that any hogs entered the plaintiff's field and did damage to his crop, as complained of in the petition; still, if you also believe from the evidence that there was a space of ground lying between the fence which the defendant had erected along the east side of the track, and another fence which was upon the west side of the plaintiff's enclosure; and that said strip of ground was open to a public highway at the south end, so that hogs and other stock could pass from the public road into said strip of ground; and that it was necessary for hogs to pass through or under both of said fences, and across said intervening strip of ground in order to get from defendant's inclosure along its track into the plaintiff's field; then the plaintiff cannot recover in this action, and your verdict must be for the defendant.[156]

Same—Liability where sufficient fence broken down by frightened animal.

(2489) The court instructs the jury that, if they believe from the evidence that the fences and cattle guards used by the defendant along its tracks were good and sufficient for turning stock under all ordinary circumstances; and that plaintiff's horse, alleged to have been killed by the negligence of the defendant, through fright broke down the fence of the defendant, or leaped the guards in a mode that only a frightened animal would have attempted, and in that way came upon the tracks at the place where the plaintiff's horse was alleged to have been killed; then the jury are instructed

[155] Approved in Kingsbury v. Missouri, K. & T. Ry. Co., 156 Mo. 379.

[156] Approved in Kingsbury v. Missouri, K. & T. Ry. Co., 156 Mo. 379.

that it does not devolve upon the defendant to prove an entire absence of negligence in running the train. Defendant would only be liable upon the plaintiff's proving carelessness or willful injury on the part of the defendant.[157]

Same—Effect of agreements to maintain fence.

(2490) The court instructs the jury that, if they believe from the evidence that S., when he built the fence, agreed that if defendant would let plaintiff build this fence tight, so as to keep in hogs; and that if plaintiff wanted to turn in horses or large stock, he would put on an additional board or pole to keep them in, and he failed to do so; and by reason of such failure, the plaintiff's horses got on the defendant's railroad and were killed; then the plaintiff cannot recover.[158]

(2491) The court instructs the jury that it was the duty of the defendant to maintain a fence along its railroad adjoining the land of the plaintiff, good and sufficient to turn cattle, sheep, horses and hogs, unless by a contract with plaintiff he agreed, as proprietor of the land adjoining, to maintain such fence.[159]

Same—Repair of fence thrown down or destroyed without company's fault.

(2492) The court instructs the jury that the defendants, after they have built a good and sufficient fence through a farm, and it is blown down, burnt down or thrown down by trespassers, have a reasonable time to repair their fence, and that they are not responsible for any damages which may ensue until such reasonable time has elapsed.[160]

(2493) The court instructs the jury that, if you find from the evidence in the case that the defendant maintained along said field during those years, or any of the time during those

[157] Chicago & A. R. Co. v. Utley, 38 Ill. 411.
[158] Approved in Illinois Cent. R. Co. v. Swearingen, 47 Ill. 206.
[159] Approved in Illinois Cent. R. Co. v. Swearingen, 47 Ill. 206.
[160] Approved in Illinois Cent. R. Co. v. Swearingen, 47 Ill. 206.

years, a fence of the character indicated in the foregoing instructions; and that from time to time it got out of repair from high water or other means; then the defendant was entitled to a reasonable time in which to repair the same after it was discovered, or by the exercise of reasonable diligence might have been discovered, that the same was out of repair; and if you find from the evidence that the defendant did in a reasonable time after that discover, or by the exercise of reasonable diligence might have discovered, that the fence was out of repair, put it in repair, and make it such a fence as above indicated; then the plaintiffs cannot recover any damage done by the hogs for the time during which it was maintaining such fence.[161]

Same—Fact of killing as tending to show insufficiency of fence.

(2494) The court instructs the jury that, if they believe from the evidence that the horse of plaintiff described in the declaration was killed by the defendant's locomotive, the mere fact of such killing is a circumstance to be taken into consideration by the jury in determining the question whether the fences and cattle guards of the defendant were good and sufficient.[162]

Same—Cattle guards.

(2495) The court instructs the jury that the statute of ——— requires defendant to construct and maintain cattle guards at all highway crossings, and connect its fence therewith to prevent cattle and other animals from going on its railroad; and if the cattle guard in question was built so as to prevent cattle and other animals from going on defendant's railway from the highway, and in a manner in general use, and in good condition of its kind, then plaintiff cannot recover on the claim in his complaint that the cattle guard was improper, and left negligently by the de-

[161] Approved in Ackley v. St. Louis, I. M. & S. Ry. Co., 30 Mo. 657.
[162] Chicago & A. R. Co. v. Utley, 38 Ill. 411.

fendant. The statute does not prescribe the kind of cattle guards that the railroad shall construct and use, excepting only that they shall be such as, with the fence connected with them, shall prevent cattle, etc., from going on the track. The company may use any kind of cattle guards that will accomplish that purpose, if they are such as are in ordinary use by railroads.[163]

(2496) The court instructs the jury that, if you find from the evidence in this case that the guards in question were not such guards as were approved by the railroad commissioner, or that they were not placed down as required by the railroad commissioner, under his plans and specifications submitted here, then you would find the defendant liable under further instructions that I will give you. Or, if you find that they were such guards, and were so placed, as required by the plans and specifications approved by the commissioner of railroads, but that the company had negligently failed to keep such guards in repair, then you will find them liable. When I say "keep them in repair," I mean in good and sufficient repair, so they would serve the purpose for which they were placed there. I do not mean that, if you find they were in that condition, they would be liable; but you must further find that this injury was occasioned because of such defect, if you find it. In other words, gentlemen, if you find that the guards in question are such as are approved; and further find that the company negligently failed to keep the same in repair, (that is, negligently permitted them to fill up between the slats with cinders, ballast or dirt,) and that these cattle went upon the railroad track, over these guards so out of repair; and that the injury was occasioned by such want of repair; then the defendant would be liable. If, on the other hand, you do not find these things to be true, then they would not be lia-

[163] Hartwig v. Chicago & N. W. Ry. Co., 49 Wis. 358.

ble; that is, if you find that the guards were in repair, the company would not be liable, or, if you find that the injury was not occasioned because of the want of repair, then the company would not be liable.[164]

Care after discovery of animals on track.

(2497) The court instructs the jury that, if they believe from the evidence that the train operated by the defendant —and which it was alleged killed the stock for whose loss this suit is brought—could have been stopped by the exercise of ordinary care and prudence before running over said stock, which it is alleged were killed; and that by reason of such neglect to stop said train the stock were run over and killed by the said train of cars; then the jury are instructed to find for the plaintiff to the amount of the value of the stock killed.[165]

Warnings and signals.

(2498) The court instructs the jury that, if they believe from the evidence that the stock of plaintiff described in the declaration was killed, as alleged in the declaration by reason of the negligence of the operators of a train on defendant's road in not ringing their bell and blowing their whistle; and if the jury believe from the evidence that plaintiff used ordinary care to prevent the killing of stock; the jury will find for plaintiff, and assess his damages as proved.[166]

(2499) The court instructs the jury that, though they may believe from the evidence that the stock of plaintiff was killed by the locomotive of defendant; and that the defendant failed to ring its bell or sound its whistle as required by the statute; this will not be enough upon which to base a verdict for plaintiff, unless the jury further find that the

[164] Approved in Hathaway v. Detroit, T. & M. Ry. Co., 124 Mich. 610.

[165] Illinois Cent. R. Co. v. Baker, 47 Ill. 295.

[166] Approved in Illinois Cent. R. Co. v. Whalen, 42 Ill. 396.

killing of plaintiff's stock was caused by reason of the neglect of defendant to ring its bell or sound a whistle.[167]

(2500) The court instructs the jury that the statutory requirement that the whistle shall be sounded at least — rods before a road crossing is reached, and that after the sounding of the whistle the bell should be rung continuously until the crossing is passed, is intended for the safety of animals as well as persons; and that the failure to give signals required by the statute will be negligence on the part of the defendant; but before such negligence will justify a recovery against the defendant, it must appear that if such signals had been given, they would have prevented the cattle of plaintiff going upon the track, or frighten them away from the crossing.[168]

Contributory negligence of owner in general.

(2501) The court instructs the jury that the rules of law as to diligence and negligence apply to stock owners as well as to railroad companies: Hence, if hogs were prohibited by law from running at large in the township where plaintiff's hogs were kept by him, and were killed by the defendant's railroad train, the law required from the plaintiff the same degree of diligence to keep his hogs from escaping, that it required from the railroad company to avoid killing them when they got in front of its train; and if the plaintiff failed to use that degree of diligence to keep his hogs from escaping, he cannot recover in this action.[169]

Determination of question of place of killing.

(2502) The court instructs the jury that in determining the limits of the village of ———, the location of the plat will not determine, but it must be determined from the facts and circumstances surrounding it; and if they believe from

[167] Quincy, A. & St. L. R. Co. v. Wellhoener, 72 Ill. 60.

[168] Graybill v. Chicago, M. & St. P. R. Co., 112 Iowa, 738.

[169] Approved in Leavenworth, T. & S. W. R. Co. v. Forbes, 37 Kan. 445.

the evidence that the town lots come down to the north side of right-of-way of the defendant, and that switches were used on both sides of the main track to receive and deliver freight; and that the public used the open space south of the main track in getting to and from cars standing on the switches; and that dwellings, and stores and warehouses were near and around the location where the cow was struck, or killed; these facts ought to be considered in determining the limits of the town of ———, and whether the cow was struck, or killed, within the limits of said town.[170]

Duty to anticipate presence of cattle on track.

(2503) The court instructs the jury that, having enclosed its right of way at the place where these horses were, the railroad company was not bound to anticipate that horses or cattle would be there on the track, but had a right to presume that the track was clear; and that defendant owed no duty to the plaintiff in relation to his trespassing horses until their presence was discovered, and then only owed the use of ordinary care to avoid injury to the horses.[171]

Liability of railroad company for killing of stock by train belonging to another company.

(2504) The court instructs the jury that, although they may believe from the evidence that the injury to and killing of plaintiff's said animals was directly caused by an engine and train run and operated on defendant's road by the ——— Railroad company and its servants, by consent or permission of defendant; and that such injury was not caused by the willful acts of the servants of the said ——— Railroad company; still, the defendants are liable for the injury; and, in law, so far as the rights of the plaintiff are

[170] Approved in Toledo, W. & W. R. Co. v. Chapin, 66 Ill. 504.

The question in this case involves whether the killing of stock was at a place where, by law, the railroad company was required to erect a fence.

[171] Mears v. Chicago & N. W. Ry. Co., 103 Iowa, 203.

concerned, the train and servants of the said ——— Railroad company, so run on defendant's road, were the train and servants of defendant.[172]

V. Fires.

Care required in general.

(2505) The court instructs the jury that it was the duty of defendant railroad company to operate its engines and locomotives, and run the same so as to guard against any accident by fire; and to exercise the highest degree of care and skill in the employment of machinery and other agencies to protect property from fire; and to prevent the emission of fire sparks from their engines.[173]

(2506) The court instructs the jury that "ordinary care" is a relative term; that what would be regarded as ordinary care, under certain circumstances, may not be ordinary care under other circumstances and conditions; and that for this reason, in passing upon defendant's negligence, you should take into account the character of the country through which the road runs; the risk to adjoining property to be guarded against; the conditions then prevailing, such as the degree of dryness, or the reverse, of the grass stubble or other material near the track, and the speed and direction of the wind; but that, on the other hand, you should give due consideration to the necessities of the railway service, and the duty of the company to its patrons and the public.[174]

Risks borne by parties erecting buildings in proximity to railroad track.

(2507) The court further instructs the jury, for the defendant, that all persons erecting buildings in the immediate vicinity of a railroad track take the risks of fire communicated from passing engines, provided such engines are

[172] Approved in Toledo, P. & W. R. Co. v. Rumbold, 40 Ill. 143.
[173] Toledo, W. & W. R. Co. v. Larmon, for use, etc., 67 Ill. 68.
[174] Riley v. Chicago, M. & St. P. Ry. Co., 71 Minn. 425.

equipped with the best known appliances to prevent the escape of fire, and kept in repair, and are managed with reasonable care and skill, even though the danger may be greatly increased by high winds or proximity to other buildings.[175]

Combustibles on railroad property.

(2508) The court instructs the jury that, although the jury may believe from the evidence that the defendant's train was supplied with the most approved apparatus for the prevention of the emission of sparks; and that said engines were operated by the most skillful engineers; and that the defendant company did all that skill and science could suggest in the management of its locomotives; yet, if they further believe from the evidence that the company negligently allowed the accumulation of dangerously combustible matter on their right of way, easily to be ignited by fire from its furnaces; and if they further believe from the evidence that said fire, by igniting said combustible matter on the said company's right of way, was thence communicated to the adjacent property of the plaintiffs; then the said defendant company is liable for all the damages resulting to their property by reason of said negligence.[176]

Defective smoke stacks and spark arresters.

(2509) The court instructs the jury that, if they believe from the evidence that the defendant, at the time of the fire complained of in this suit and alleged to have been caused by sparks escaping from engines operated by defendant, was using on all its engines the best known appliances to prevent the escape of sparks, then the defendant would not be liable. If defendant used the best means in their command and employed competent servants, the defendant has done all that the law requires.[177]

[175] Approved in Chicago & A. R. Co. v. Pennell, 110 Ill. 435.

[176] New York, P. & N. R. Co. v. Thomas, 92 Va. 606.

[177] Approved in Illinois Cent. R. Co. v. McClelland, 42 Ill. 355.

(2510) The court instructs the jury that you have the opinion of witnessses that no engine provided with the best means in common use would throw out such lumps of fire; and you are to say what gives way, whether this railroad engine was in good order, with a netting the best in known and in common use, or whether there was something which permitted the escape of sparks which could not have escaped from such an engine if in good order.[178]

(2511) The court further instructs the jury that, if they believe from the evidence that numerous fires have been occasioned along the defendant's road, either prior or subsequent to the —— day of ——, 19—, by sparks issuing from the defendant's locomotive; such facts may be considered by the jury for the purpose of determining whether or not there was negligence on the part of the defendant's employees, or defects in the defendant's engine; and also for the purpose of showing a negligent habit of the officers and agents of the defendant company.[179]

(2512) The court instructs the jury that, even if they do believe from a preponderance of the evidence that the fire that consumed the hotel did originate from sparks from the engine; yet, if they further believe from the evidence that the engine at that time was furnished with the best known appliances to prevent the escape of fire, which were in good repair, and were managed with reasonable care and skill; then the defendant is not liable, and they should find the defendant not guilty.[180]

(2513) The court instructs the jury that, if from the evidence they find that defendant's engine set out the fire alleged; and also that the same engines set out several successive fires on the same trip, and in the same day; then the fact of the repeated setting out of such fires will be evidence

[178] Brush v. Long Island R. Co., 10 App. Div. 535.
[179] New York, P. & N. R. Co. v. Thomas, 92 Va. 606.
[180] Approved in Chicago & A. R. Co. v. Pennell, 110 Ill. 435.

tending to show that the defendant's engine was not properly constructed as to its appliances for the prevention of the escape of fire, or that the same was not properly used at the time, or that it was not in repair; and as such, must be considered by you in making up your verdict, and in determing as to whether or not this fire occurred through the fault or negligence of defendant or its employes.[181]

(2514) The court instructs the jury that, if they believe from the evidence that the property of the plaintiff was burned in consequence of the failure of the defendant company to use the best appliances and safeguards, in the nature of ash-pans and spark arresters on their engines; and such as are generally adopted by and used upon the modern leading railroads in this country, the defendants are liable for any loss occasioned by any such omission.[182]

(2515) The court instructs the jury that, if they believe from the evidence that fires have been occasioned along the defendants' road on or about the —— day of ——, 19—, by sparks issuing from the defendants' locomotives; such facts may be considered by the jury for the purpose of determining whether or not there was negligence on the part of the defendants' employees or defects in the defendants' engines, and also for the purpose of showing a negligent habit of the officers and agents of the defendant company.[183]

(2516) The court instructs the jury that it is incumbent upon the railroad company to avail itself of the best mechanical contrivances and inventions in known practical use, which are effectual in preventing the burning of private property by the escape of sparks and coals from its engines; and that if they find that the defendant company has failed to do so, it is liable for injury to the plaintiff caused by the failure of said defendant company to use them.[184]

[181] Approved in Slossen v. B. C. R. & N. R. Co., 60 Iowa, 215.
[182] Approved in Kimball & Fink v. Borden, 97 Va. 477.
[183] Approved in Kimball & Fink v. Borden, 97 Va. 477.
[184] Approved in Kimball & Fink v. Borden, 97 Va. 477.

Fire communicated from burning building set on fire by sparks from locomotive.

(2517) The court instructs the jury that, in order to justify you in finding a verdict for plaintiff for the value of the buildings, it is incumbent on you to find from the evidence in this case that the destruction of the barn was the direct and natural cause of the fire being emitted from the engine; and if you find that the fire was emitted from the engine immediately to the house, the plaintiff would be entitled to recover. To justify a verdict covering or including the value of the house, you must find that the same was destroyed by reason of the fire being communicated thereto directly from the engine, or without the assistance of other agencies arising from other causes. This is a question for you to determine from the evidence.[185]

Same—Liability for fire communicated from depot not owned by defendant.

(2518) The court further instructs the jury, for the defendant, that if they believe from the evidence that the fire that consumed the depot originated from a defective stovepipe or flue in the depot, you will find the defendant not guilty.[186]

(2519) The court instructs the jury that, if you believe from the evidence that the depot at N. was owned by the ——— Railroad Company, and was in charge of men selected, employed by, and under control of said ——— Railroad Company; then the mere fact that the defendant may have paid to some of said men in charge of the depot a part of their wages, would not make the defendant liable for the manner in which the depot was conducted or managed.[187]

Duty of adjoining landowner to keep premises free from rubbish.

(2520) The court instructs the jury that, if you believe

185 Frace v. New York, L. E. & W. R. Co., 143 N. Y. 182.

186 Approved in Chicago & A. R. Co. v. Pennell, 110 Ill. 435.

187 Approved in Chicago & A. R. Co. v. Pennell, 110 Ill. 435.

from the evidence that any one or more of the fires which are complained of by the plaintiff in the case were caused by or originated from the carelessness of the defendant's servants or the defect in the construction of the defendant's engine, or from the carelessness of the defendants in permitting dry grass and leaves and other combustible matter to accumulate on the side of their said railroad track adjoining the premises of the plaintiff, so that fire first falling from defendant's engine caught said dry grass or dry leaves or other combustible matter, and thence communicated with the premises of the plaintiff and thus occasioned the damage; and you further believe from the evidence that plaintiff's premises adjoining the place where the fire spread to his premises were free from an accumulation of dry grass and weeds; you will find the issues for the plaintiff, and assess his damages at such sum as you believe from the evidence he has sustained from such careless or negligent acts.[188]

(2521) The court instructs the jury that, if you further believe that plaintiff allowed hay or other rubbish to accumulate on or about his property, or left any cracks or openings in his building through which fire from a passing locomotive could readily communicate to the hay or other inflammable matter inside such building; and that the fire was first communicated to the scattered hay or other inflammable rubbish so left exposed, or to the hay or other inflammable matter exposed through the cracks or openings of the buildings; and you further believe that the doing or permitting these things on the part of plaintiff, were what an ordinarily prudent man would not have done under the same or like circumstances; then plaintiff cannot recover because of his negligence.[189]

Plaintiff's duty to take steps to prevent spread of fire.

(2522) The court instructs the jury that, if they believe

[188] Chicago & N. W. R. Co. v. Simonson, 54 Ill. 504.

[189] Approved in Atchison, T. & S. F. R. Co. v. Ayers, 56 Kan. 176.

from the evidence that the fire complained of in this suit was caused by sparks escaping from an engine operated on defendant's road, and that plaintiff saw the fire so caused in time to put it out, while it was still on the right-of-way of defendant and before it reached the plaintiff's meadow; then it was plaintiff's duty to have extinguished the fire; and if, through his negligence in not doing so the fire consumed the property of plaintiff, the defendant will not be liable for such loss.[190]

Presumptions and burden of proof of negligence.

(2523) The court instructs the jury that, if you believe from the evidence that the communication of the fire by defendant's engine is proved or admitted, then the burden is on the defendant to overcome the statutory presumption of negligence arising from that fact, by showing that the engine was properly equipped to arrest sparks, and that it was in good order and skillfully managed.[191]

(2524) The court instructs the jury that, under the issues in this case the burden of proof is upon the plaintiff to prove, by the preponderance of the evidence, that the fire that burned the depot was communicated by sparks from the passing train.[192]

(2525) The court instructs the jury that, if you find from the evidence that the defendant railway company set out a fire by sparks escaping from its engines; and that the said fire damaged plaintiff; then, in that event, the law presumes that the defendant was negligent in operating the said trains, and the company will be held liable, unless it satisfies you by evidence rebutting this presumption that the company was not negligent in operating its said trains.[193]

[190] Approved in Illinois Cent. R. Co. v. McClelland, 42 Ill. 355.

[191] American Strawboard Co. v. Chicago & A. R. Co., 177 Ill. 513.

[192] Approved in Chicago & A. R. Co. v. Pennell, 110 Ill. 435.

[193] Approved in Krejci v. Chicago & N. W. Ry. Co., 26 Am. & Eng. Ry. Cas. (N. S.) 924.

(2526) The court instructs the jury that, if they believe from the evidence in this case that the fire which caused the consumption of the property of the plaintiff, (in the declaration mentioned), was set by the defendants' locomotives, there is a presumption that the defendants were negligent, placing on the railroad company the burden of proving that it had used the best precautions known for confining sparks and cinders.[194]

(2527) The court instructs the jury that, if they believe from the evidence that the woods on the land of the plaintiffs, adjoining the railway, were ignited by particles of fire that issued from the defendant's engine; and by means thereof the shatters, wood, manure and down timber on said land were consumed, and the growing trees thereon injured, and stumps and butts of trees upon said woodland burnt down into the ground, leaving large and dangerous holes in many places in said woodland, this does not, of itself, justify the inference of negligence; but the fact of negligence must be established by additional evidence, and the burden of proof is on the plaintiffs to show it. But the above circumstances are to be considered along with other circumstances attending said fire, in determining whether there was negligence.[195]

Sufficiency of proof.

(2528) The court further instructs the jury that before the plaintiff can recover in this case, he must prove by a preponderance of the evidence, first, that the defendant wrongfully set fire to the depot (either by an engine not managed with reasonable care and skill, or by an engine not in a reasonably safe condition); second, that the fire that consumed the hotel was communicated from the said depot building.[196]

(2529) The court further instructs the jury, for the de-

[194] Kimball & Fink v. Borden, 97 Va. 477.

[195] New York, P. & N. R. Co. v. Thomas, 92 Va. 606.

[196] Approved in Chicago & A. R. Co. v. Pennell, 110 Ill. 435.

fendant. that before the plaintiff can recover in this case, he must prove by a preponderance of the evidence, first, that the defendant wrongfully set fire to the depot; second, that the fire that consumed the hotel was communicated from the said depot building. It is not enough, to enable the plaintiff to recover, to prove that sparks escaped from defendant's locomotive, which possibly might have caused the fire or fires in controversy; but he must prove by a preponderance of the evidence that such spark or sparks, if any, did cause such fire or fires.[197]

CHAPTER CVII.

RAPE.

Definition and elements, 2530.
As to the necessity of actual carnal knowledge, 2531.
As to the character of prosecutrix, 2532.
Bad character of prosecutrix to be considered, 2533, 2534.
As to absence of consent, 2535.
Necessity of resistance, 2536.
As to the extent of resistance required, 2537.
As to inference of consent from feebleness of resistance, 2538.
Consent need not be expressed, 2539.
Resistance rendered impossible by fear or surprise, 2540.
Resistance prevented by threats or intimidation, 2541, 2542.
Woman non compos, insensible, or asleep, 2543.
As to effect of complaints by prosecutrix, 2544.
As to failure to make speedy complaint, 2545.
As to failure to make outcry, 2546.
As to subsequent friendly association with defendant, 2547.
Assault with intent to rape—Necessity of showing specific intent, 2548.
Same—Effort abandoned on resistance being made, 2549.

Definition and elements.

(2530) The court instructs that, before defendant can be convicted of the crime of rape, the jury must be convinced by the evidence beyond a reasonable doubt: (1)

[197] Approved in Chicago & A. R. Co. v. Pennell, 110 Ill. 435.

That defendant had actual carnal connection with the prosecutrix. (2). That such connection was against her will. (3). That it was accomplished by force, threats or intimidation.

As to the necessity of actual carnal knowledge.

(2531) The court instructs that actual carnal intercourse is essential to the crime of rape; and though the jury believe from the evidence that defendant assaulted the prosecutrix, and endeavored by force to have carnal connection with her against her will; unless the jury are convinced by the evidence, beyond a reasonable doubt, that he actually succeeded in accomplishing his design, he cannot be convicted of the offense charged.[1]

As to the character of prosecutrix.

(2532) The court instructs that if they believe from the evidence that defendant had carnal knowledge of the prosecutrix, forcibly and against her will, and despite her utmost resistance, he is guilty of the offense charged, though the prosecutrix was a woman of bad character or even a common prostitute.[2]

Bad character of prosecutrix to be considered.

(2533) The court instructs that though the fact that the prosecutrix is a woman of bad character, if they believe it to be a fact, is in itself no defense, if the carnal connection was had against her will; yet evidence of her bad character is proper to be considered by the jury in determining whether she consented to the connection; and the jury are entitled to take it into consideration, in connection with the other evidence, if any, that she did consent.[3]

(2534) Evidence has been introduced as to the moral character of the prosecuting witness, and as to her reputa-

[1] Hardtke v. State, 67 Wis. 552; Wesley v. State, 65 Ga. 731.
[2] State v. Long, 93 N. C. 542.
[3] Anderson v. State, 104 Ind. 467.

tion for chastity and virtue. You are not to understand from this that a rape can not be committed on a woman of bad moral character. A woman may be a common prostitute, and may still be the victim of a rape. This evidence has been introduced only for the purpose of affecting her credibility as a witness, and as a circumstance affecting the probability of the act of intercourse being voluntary or against her will, upon the theory that a person of bad moral character is less likely to speak the truth as a witness than one of good moral character, and that a woman who is chaste and virtuous will be less likely to consent to an act of illicit carnal intercourse than one who is unchaste. So that, whatever conviction this evidence may produce in your minds as to whether she is chaste or unchaste, you will treat it as a circumstance affecting her credibility to aid you in determining whether her story is true or false, and the act of intercourse voluntary or against her will.[4]

As to absence of consent.

(2535) The court instructs that it is essential that the carnal connection be against the will of the woman. If she consciously consents thereto, however tardily or reluctantly, and however persistently she may resist for a time, the act is not rape.[5]

Necessity of resistance.

(2536) The court instructs that it is not enough that the woman be unwilling to submit to carnal intercourse. Unless insensible or asleep, or unless intimidated by threats, she must manifest her unwillingness by resisting to the uttermost of her ability, and until her resistance is overcome by superior force.[6]

[4] Anderson v. State, 104 Ind. 467.

[5] Bean v. People, 124 Ill. 576; People v. Croswell, 13 Mich. 427.

[6] People v. Croswell, 13 Mich. 427; People v. Dohring, 59 N. Y. 374.

As to the extent of resistance required.

(2537) The court instructs that the woman must resist to the point of being overpowered by actual force, or of inability from loss of strength longer to resist. She must resist in every manner which appears feasible, by striking, biting or kicking; by resort to any weapon which may be available; and must continue her struggles until exhausted or overpowered.[7]

As to inference of consent from feebleness of resistance.

(2538) The court instructs that, if from the feebleness or lack of determination with which the prosecutrix resisted the assault, the jury have a reasonable doubt as to whether she did not tacitly consent to the connection, they must acquit the defendant.[8]

Consent need not be expressed.

(2539) The court instructs that it is not necessary, to relieve the defendant of guilt, that the consent of prosecutrix to the carnal connection should have been expressly asked and given. Though she remonstrated against the indecent liberties taken with her person, and may even have made some slight resistance, yet the jury may infer from her conduct that she did actually consent; and unless they are convinced beyond a reasonable doubt that she did not, they must acquit.[9]

Resistance rendered impossible by fear or surprise.

(2540) The court instructs that prosecutrix is required to resist to the utmost of her ability. The resistance required depends on the circumstances of each particular case; and in determining whether she did resist to the best of her ability, the jury may take into consideration her youth and

[7] Anderson v. State, 104 Ind. 467; People v. Abbott, 19 Wend. (N. Y.) 192; People v. Dohring, 59 N. Y. 374.

[8] People v. Abbott, 19 Wend. (N. Y.) 192.

[9] State v. Cross, 12 Iowa, 66.

inexperience, the situation in which she found herself, and the surprise and fright occasioned by a sudden attack; and determine under all the circumstances whether she did all that she reasonably could to prevent the consummation of the offense.[10]

Resistance prevented by threats or intimidation.

(2541) The court instructs that, if the jury believe from the evidence that defendant threatened to kill prosecutrix or do her great bodily harm unless she should submit to carnal intercourse with him; and that prosecutrix was so terrified by such threats that she did not dare to resist; and that defendant had carnal intercourse with her while she was by such terror disabled from resistance; and that her submission was induced wholly by terror caused by such threats, defendant is guilty of the crime of rape.[11]

(2542) The court instructs the jury that rape is the carnal knowledge of a woman without her consent, obtained by force or threats. The force employed to obtain such carnal knowledge must be such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and other circumstances of the case. The threats employed must be such as might reasonably create a just fear of death or great bodily harm, in view of the relative condition of the parties, as to health, strength and all other circumstances of the case.[12]

Woman non compos, insensible, or asleep.

(2543) The court instructs that, if the jury believe from the evidence that defendant had carnal knowledge of the prosecutrix while she was insensible (or asleep, or that she was at the time of so weak and imbecile mind that she did not understand the nature of the act), he is guilty of rape,

[10] People v. Connors, 126 N. Y. 278.

[11] State v. Shields, 45 Conn. 263; Rice v. State, 35 Fla. 236.

[12] Fitzgerald v. State, 20 Tex. Cr. App. 281.

though by reason of her insensibility (or sleep or imbecility) she made no resistance, and no force was necessary.[13]

As to effect of complaints by prosecutrix.

(2544) The court instructs that, if the jury believe that shortly after the alleged rape, prosecutrix made complaint to her relatives or friends that such an offense had been perpetrated on her, such complaint may be considered in corroboration of her testimony as to the commission of the rape.[14]

As to failure to make speedy complaint.

(2545) The court instructs that, if the prosecutrix failed to make speedy complaint of the offense which she claims was perpetrated on her, the circumstance is one to be considered by the jury in determining whether the offense was committed as she testifies; it is entitled to consideration in determining whether the sexual intercourse, if it took place, was not voluntary. The jury are to consider whether a woman, upon whom such an indignity as a forcible ravishment has been committed, would not be moved to instantly complain thereof to her relatives or intimates; and the failure of the prosecutrix to so complain, is to be given such weight as you think proper.[15]

As to failure to make outcry.

(2546) The court instructs that, if the jury believe that at the time of the alleged rape the husband of prosecutrix (or any other person) was so near that he might have heard an outcry, and that no outcry was made; and that prosecutrix and her husband afterwards associated in a friendly man-

[13] State v. Atherton, 50 Iowa, 189; Harvey v. State, 53 Ark. 425. See, also, State v. Reid, 39 Minn. 796.

[14] Baccio v. People, 41 N. Y. 265.

[15] Turner v. People, 33 Mich. 363.

ner with defendant;—these circumstances raise a strong presumption of defendant's innocence.[17]

As to subsequent friendly association with defendant.

(2547) The court instructs that, if the jury believe that after the commission of the alleged offense the prosecutrix remained in the company of defendant and associated with him in an apparently friendly manner, this circumstance is to be considered in determining the credit to be given to her testimony.[18]

Assault with intent to rape—Necessity of showing specific intent.

(2548) The court instructs that to constitute an assault with intent to ravish, there must be more than mere indecent or even violent familiarities, consistent with an effort to induce consent; and the acts of defendant must convince the jury, beyond a reasonable doubt, that his intention was to enforce compliance, regardless of resistance.[19]

Same—Effort abandoned on resistance being made.

(2549) The court instructs that, though they believe from the evidence that defendant assaulted the prosecutrix and took indecent liberties with her person; yet, if he voluntarily abandoned his effort to have sexual intercourse with her as soon as she made any determined resistance; he cannot be convicted of an assault with intent to commit rape.[20]

CHAPTER CVIII.

RECORDING OF WRITTEN INSTRUMENTS.

In general, 2550.

In general.

(2550) The court instructs the jury that, if the asterisks

[17] Barney v. People, 22 Ill. 160.

[18] Sutton v. People, 145 Ill. 279.

[19] Stevens v. People, 158 Ill. 111; Outlaw v. State, 35 Tex. 481.

[20] People v. Clark, 3 Cr. Rep. (N. Y.) 280.

and note referred to were in fact a part of the mortgage at the time it was made and before it was left for record, then the certificate of record, made by the clerk thereon, was conclusive evidence that all which was a part of the mortgage when it was made and left for record, was recorded, whether above or below the certificate; but that if the asterisks and note were not, in fact, upon and a part of the mortgage when left for record, and were put upon it after it was recorded,—in that case, the mortgage and certificate of record would not be effectual or valid as against the defendants, and the plaintiff could not maintain this action; and that the burden of proof that the asterisks and note were a part of the mortgage at the time it was made, and before it was left for record, was upon the plaintiff.[1]

CHAPTER CIX.

REPLEVIN.

In general, 2551.
Possession of defendant, 2552.
Liability of mortgagee for taking chattels from possession of mortgagor, 2553.

In general.

(2551) The court instructs the jury that ff they believe from the evidence, that the plaintiff in this case, at the time the suit was commenced, was lawfully entitled to the immediate possession of the property, in the declaration described, and that the defendant had the same in his possession, and that a demand was made, and a refusal to deliver up the same by the defendant, they will find for the plaintiff.[2]

[1] Adams v. Pratt, 109 Mass. 59.

It was claimed that the asterisks and note were not upon the mortgage when recorded, and that the asterisks and note were necessary to identify the property which was the subject of the suit.

[2] Whisler v. Roberts, 19 Ill. 274.

Possession of defendant.

(2552) The court instructs the jury on behalf of the defendant that, in order to entitle the plaintiff to a verdict, it is incumbent on the plaintiff to establish, by evidence in the case, that the goods and property replevied in this suit were in the possession of the defendant, or that he detained the same from the plaintiff at the time the suit was commenced; and unless the jury do believe from the testimony given in this case that said property was in the possession of the defendant, or that he detained the same when this suit was commenced, then they should find for the defendant upon the issue of detention of such property only.[3]

Liability of mortgagee for taking chattels from possession of mortgagor.

(2553) The court instructs the jury that this is an action of replevin by plaintiff, ———, against the defendant, ———, to recover the possession of property described in the affidavit, writ and declaration. The plaintiff claims that he was in the lawful possession of the property, and that defendant wrongfully took and unjustly detained the same. The defendant claims a right to the possession of the property under a chattel mortgage which he held upon the property. The court instructs the jury that to entitle the plaintiff to recover in this action, it is only necessary for him to show that the property was taken wrongfully from his possession by the defendant, or by some one acting for the defendant; that is, to justify the taking by the defendant, there must have been a violation of some of the conditions of the mortgage by the plaintiff; and if the jury believe from the evidence that the property was wrongfully taken by the defendant from the plaintiff, and that the conditions of the mortgage were not violated, then you will find the defendant guilty.[4]

[3] Approved in Reynolds v. McCormick, 62 Ill. 412.

[4] Mathews v. Granger, 71 Ill. App. 467.

CHAPTER CX.

ROBBERY.

Definition and elements, 2554.
Force or violence, 2555.
Violence must precede or accompany taking, 2556.
Putting in fear, 2557.
Fear unnecessary where there is actual violence, 2558.

Definition and elements.

(2554) The jury are instructed that in order to convict, they must be convinced by the evidence beyond all reasonable doubt.

1. That defendant took from the person of A. B., or in his immediate presence, the property mentioned in the indictment.

2. That A. B. then owned such property or had a right to its possession.

3. That in taking such property, defendant intended to steal the same; that is, to deprive the owner permanently thereof.

4. That the taking was against the will of A. B., and accomplished either by physical force or by putting him in such fear of personal violence that he dared not resist the taking of his property.[1]

Force or violence.

(2555) The jury are instructed that to constitute robbery, the property must be taken by violence or intimidation; and the force necessary to take the property from the per-

[1] People v. Vice, 21 Cal. 344; Durand v. People, 47 Mich. 332; State v. Calhoun, 72 Iowa, 432; Fanning v. State, 66 Ga. 167; Long v. State, 12 Ga. 293. The elements of the offense are the same as those of larceny, with the addition of the requirements that the taking must be from the person, and be accomplished by force. The instructions given under "Larceny" as to asportation, intent, etc., are applicable to prosecutions for robbery.

son of the owner, without resistance on his part, is not sufficient. There must be a struggle, resistance overcome by force; or there must be injury done to the owner in obtaining possession of the property. Accordingly, if the jury find that defendant took the property of A. B. by snatching it unexpectedly from his hand, using no more force than was necessary to the mere act of snatching, he cannot be convicted of robbery.[2]

Violence must precede or accompany taking.

(2556) The jury are instructed that, if they believe from the evidence that defendant obtained the property of A. B. without the use of force, he cannot be convicted of robbery, though immediately afterward he used force to retain the property or escape arrest.[3]

Putting in fear.

(2557) The jury are instructed that, to constitute a taking by intimidation without force, the owner must be induced to surrender his property by threats of injury to his person or property, which excite a reasonable apprehension of danger. There must be such circumstances of terror, such threatening by word or gesture, as in common experience is likely to create an apprehension of danger, and cause a man to part with his property for the safety of his person.[4]

Fear unnecessary where there is actual violence.

(2558) The jury are instructed that the taking must be by force or by intimidation. Either is sufficient. Where the resistance of the owner is overcome by actual violence and his property forcibly taken from him; it is immaterial whether he was thereby put in terror.[5]

[2] Shinn v. State, 64 Ind. 13.

[3] State v. John, 5 Jones (N. C.) 163.

[4] Long v. State, 12 Ga. 293.

[5] State v. Gorham, 55 N. H. 152. It has been said that in such case it is immaterial that the owner did not know that he was being robbed. Thus it is robbery to strike one senseless and take property from his person. State v. Burke, 73 N. C. 83.

CHAPTER CXI.

SALES.

I. The Contract. Evidence and Construction.

Implied contract from acceptance—Recovery on quantum meruit, 2559.

Action by seller against auctioneer to whom goods were sent by buyer—Liability of auctioneer, 2560.

Necessity of willingness of buyer to accept and pay for property, 2561.

Sufficiency of evidence—Burden of proof, 2562.

II. Delivery and Acceptance.

Duty to deliver—Knowledge of purchaser that seller may not be able to obtain goods sold, 2563.

Excuse for failure to deliver, 2564.

Sale for future delivery—Implication of time to deliver, 2565, 2566.

Right of purchaser to refuse to accept, 2567.

Duty to deliver—Effect of breach by plaintiff, 2568.

Right of purchaser to refuse to accept goods on failure to deliver promptly, 2569, 2570.

Right of purchaser to refuse to accept delivery of part, 2571.

Right to refuse to accept after acceptance of portion of goods under a continuing contract, 2572.

Necessity of prompt rejection, 2573.

Waiver of right to object to goods as second hand, 2574.

Waiver of defects—Use of soda fountain after knowledge of defect, 2575.

Duty to make complaint within a reasonable time—Duty to return goods, 2576.

Failure of goods to comply with contract—Duty to return or account for market value, 2577.

III. Transition of Title.

Necessity of ascertaining quantity, 2578.

Delivery without requiring payment, 2579.

Placing of machinery in mill—Necessity of final adjustment, 2580.

Delivery on condition, 2581.

Right of seller to retake goods, where condition is not performed, 2582.

Effect of unconditional delivery, 2583.

Liability for loss before delivery, 2584.

IV. Warranties.

Representations constituting warranty, 2585-2587.
Necessity of use of the word warrant, 2588.
Implied warranty from description, 2589.
Implied warranty on sale by manufacturer or sale by particular description, 2590, 2591.
Implied warranty on sale by sample, 2592.
Implied warranty on purchase of goods previously purchased by sample, 2593.
Implied warranty after opportunity of inspection, 2594.
Extent of implied warranty, 2595, 2596.
Waiver of warranty by acceptance, 2597, 2598.
Burden of proof of warranty, 2599, 2600.
Fulfillment of warranty, 2601.
Warranty on sale of pork on board of trade, 2602.

V. Rescission.

Time in which to elect to rescind, 2603.
Right of seller to recover goods—Purchase with intent not to pay, 2604, 2605.
Necessity of return of notes delivered as part of purchase price, 2606.
Rescission on account of misrepresentation—Burden of proof, 2607.
Rescission on account of misrepresentation as to market, 2608.
Effect of intervention of rights of third party, 2609.
Waiver of right to rescind, 2610.
Waiver of right to rescind by receipt of payments, 2611.
Effect of renting portion of the property, 2612.
Rejection of goods—Failure to act in good faith, 2613.

VI. Damages and Amount of Recovery.

Amount of recovery in action for purchase price, 2614.
Sufficiency of proof of compliance with contract, 2615.
Measure of damages for failure to deliver goods, 2616, 2617.
Recovery of purchase money, 2618.
Set-off of damages from breach of warranty, 2619, 2620.
Set-off of breach of warranty when property is not returned, 2621.
Set-off of damages for breach of warranty against notes given for purchase price, 2622.
Effect of acceptance and voluntary payment, 2623.
Agreements for settlement of claim for rebate, 2624.
Amount of abatement for breach of warranty, 2625.
Recovery for minor defects in costly apparatus, 2626.
Recovery of cost of repairs, 2627.

Measure of damages for breach of warranty, 2628.
Allowance of interest, 2629.
Peremptory instruction for plaintiff in action for purchase price, 2630.

I. The Contract. Evidence and Construction.

Implied contract from acceptance—Recovery on quantum meruit.

(2559) The court instructs the jury that, if they find from the testimony that plaintiff delivered to the defendants the flax and wheat in controversy, and there had been no previous contract for the sale or purchase of it, the reception of the same by the defendant would be sufficient to entitle the plaintiff to recover the market value of the same.[1]

Action by seller against auctioneer to whom goods were sent by buyer—Liability of auctioneer.

(2560) The court instructs the jury that the plaintiffs are not precluded from recovering in this action by reason of any advances made to L., or expenses incurred by the defendant upon the goods replevied, if the jury shall find that at the time said goods were delivered to him, the defendant had knowledge of circumstances calculated to put a man of ordinary prudence and caution upon inquiry as to whether said L. was not perpetrating a fraud in selling off his stock at auction at that time, and the defendant failed to make inquiry into the character of the transaction in which said L. was engaged.[2]

Necessity of willingness of buyer to accept and pay for property.

(2561) The court instructs the jury that, if they believe from the evidence that said defendant bargained his twelve fat hogs to the plaintiffs at $— per hundred weight on the —— day of ——, 19—, to be delivered to the plaintiffs at P. on the —— day of —— 19—, and that the defendant

[1] Approved in J. O. Mulligan & Co. v. Butcher, 23 Neb. 683.
[2] Approved in Higgins v. Lodge, 68 Md. 229.

failed to deliver the same; yet the plaintiffs are not entitled to recover in this case unless it has been proven, and the jury from the evidence believe, that said plaintiffs were ready and willing to pay for said hogs at said agreed price, at the stipulated time and place of delivery.[3]

Sufficiency of evidence—Burden of proof.

(2562) The court instructs the jury that the burden of showing that the oats delivered by the defendant were not the kind which he contracted to deliver, is upon the plaintiff; and unless he has satisfied the minds of the jury, by the evidence adduced, that the oats delivered were not the kind or variety so agreed to be delivered, then they must find for the defendant.[4]

II. Delivery and Acceptance.

Duty to deliver—Knowledge of purchaser that seller may not be able to obtain goods sold.

(2563) The court instructs the jury that, if the jury believe from the evidence that nothing was agreed upon between the parties about the time for the delivery of the iron; but that the plaintiff, or his agent, was informed by the defendant, at or about the time the said contract was agreed on, that he, the defendant, was to get the iron from the ——— R. Co., and that he was dependent upon such company as to when it would be delivered; and further believe that the defendant did, as soon as he received any of the iron from the said company, offer to deliver it to the said plaintiff, who, after receiving a part, refused to accept any more; then they are to find for the defendant.[5]

Excuse for failure to deliver.

(2564) The court instructs the jury that, if they believe from the evidence that the defendant, on ——, the ——

[3] Kitzinger v. Sanborn, 70 Ill. 146.
[4] Approved in Gachet v. Warren, 72 Ala. 288.
[5] Approved in Smith v. Snyder, 77 Va. 432.

day of ——, bargained to the plaintiffs his (hogs) at $— per hundred weight, to be delivered to the plaintiffs at P. on ———, the following day, and, upon delivery, to be paid for by the plaintiffs; and that said agreement, on the part of said defendant, was upon the condition that the weather was good on said ———; and that if the weather was not good, and the hogs remained in the pen until ———, the hogs were to remain the property of said defendant; and if the jury also believe from the evidence that said ——— was a very stormy day, and one not reasonably fit for removing said hogs from the residence of said defendant, where said hogs then were, to said P.; then the jury should find for the defendant.[6]

Sale for future delivery—Implication of time to deliver.

(2565) The court instructs the jury that, when a contract is made, to be performed at a certain place, but at no definite time, the law implies that it is to be performed within a reasonable time.[7]

(2566) The court instructs the jury that, if they believe from the evidence in this case that the defendants contracted with the plaintiff for the purchase of corn, as in the plaintiff's declaration alleged, and to be delivered to the defendants upon their giving the plaintiff ten days' notice of the time they, the defendants, desired its delivery, that it became the duty of defendants, within a reasonable time thereafter, to call for the delivery of said corn; and if they further believe from the evidence that the defendants at no time prior to the commencement of this suit ever notified the plaintiff of their readiness to receive said corn; and if they further believe from the evidence that, upon several occasions in the month of ——, —, the plaintiff offered to then deliver the said corn and was ready and willing to deliver the same, and was prevented from delivering the same by the refusal of

[6] Kitzinger v. Sanborn, 70 Ill. 146.

[7] Approved in Sanborn v. Benedict, 78 Ill. 309.

the defendants to permit the plaintiff to so deliver said corn; that such time was a reasonable time for the plaintiff to hold himself in readiness to deliver the corn upon ten days' notice, and that he had a right to demand that the defendants should receive the said corn; and if they further believe from the evidence that the plaintiff did, in the month of ——, —, upon various occasions, request the defendants that they receive the same, and that the plaintiff was ready and willing and able to deliver said corn; and if they further believe from the evidence that the defendants refused to receive the same, and that the defendants have never, prior to the commencement of this suit, notified the plaintiff of their readiness to accept the corn; it is such an unreasonable delay on the part of said defendants, as to entitle the plaintiff to maintain this suit.[8]

Right of purchaser to refuse to accept.

(2567) The court instructs the jury that the first question for you to consider is, whether or not the defendant was justified in its refusal to take the (boat). Under the contract of sale and the evidence in this case, the defendant was to take the boat, provided, upon trial he was satisfied with the soundness of her machinery, and policies, etc. This means that the defendant was not absolutely beyond all dispute bound to take the boat; but his refusal could only be predicated upon his dissatisfaction after the trial with the soundness of the boat's machinery and boilers, or other material parts of the boat.[9]

Duty to deliver—Effect of breach by plaintiff.

(2568) The court instructs the jury that, if they believe that the contract between the parties was that defendant was to deliver to the plaintiff — tons of iron as soon as he could get it from the R. Co., and was to receive $— per

[8] Approved in Sanborn v. Benedict, 78 Ill. 309.

[9] Gray v. Central R. Co. of New Jersey, 11 Hun (N. Y.) 70.

ton therefor; and that he did offer to deliver to the plaintiff so much of said iron as he, the said defendant, received from said company, and as soon as he so received it; and that the plaintiff after accepting a part of said iron, refused to receive any more; then they are to find for the defendant.[10]

Right of purchaser to refuse to accept goods on failure to deliver promptly.

(2569) The court instructs the jury that, if they find from the evidence that the plaintiff sold to the defendants a cargo of kainit to be shipped from the port of S., in G., in a vessel called the ——, during the month of October or November; and that in the usual course of time said vessel should have arrived at her port of destination from the 13th to the 31st of Jan., 19—; and shall further find that said cargo did not arrive in Wilmington until the month of June, 19—, when the defendants had no use for the same; and shall further find that the delay in the arrival was due to her unseaworthiness and her inability to carry the cargo sold; and that the defendants notified plaintiff in the month of March, 19—, of their refusal to accept said cargo on arrival; the plaintiff is not entitled to recover.[11]

(2570) The court instructs the jury that, if they find from the evidence that the plaintiff sold to the defendants the cargo of kainit in evidence, and that the plaintiff knew that said cargo was to be used by the defendants during the months of January and February, 19—, for their spring business; and shall further find that said cargo did not arrive for delivery until the month of June, 19—; the plaintiff is not entitled to recover.[12]

Right of purchaser to refuse to accept delivery of part.

(2571) The court instructs the jury that, if they find

[10] Approved in Smith v. Snyder, 77 Va. 432.

[11] Approved in Salmon v. Boykin, Carmer & Co., 66 Md. 541.

[12] Approved in Salmon v. Boykin, Carmer & Co., 66 Md. 541.

from the evidence in this case that the plaintiff sold to the defendants —— tons of kainit to be delivered at the port of W., and that the plaintiff agreed to give to the defendants the name of the vessel from which he proposed to make said delivery, and did give the name of said vessel as the ——; and shall further find that said cargo of five hundred and seventy-three tons was not delivered in the ——, but that two hundred and sixty tons thereof arrived for said delivery in the ——, and about three hundred tons thereof arrived in a vessel called ——, and the balance of said cargo was left behind in the port of A.; and shall further find that the defendants refused to accept the goods so delivered, their verdict must be for the defendant.[13]

Right to refuse to accept after acceptance of portion of goods under a continuing contract.

(2572) The court instructs the jury that, if the jury find that the contract offered in evidence was entered into between the plaintiff and defendant; and that the plaintiff was ready and willing and did offer to deliver, during the period of time covered by said contract, coal daily, in quantities and of the quality contemplated by the contract; and that after receiving, consuming and paying for a portion of the coal embraced in said contract, the master of machinery and the master of transportation of the defendant rejected said coal as not satisfactory to them; and that said rejection was not bona fide, but that the defendant setting up such rejection as an excuse thereafter refused to receive the balance of said coal from the plaintiff; then the plaintiff is entitled to recover.[14]

Necessity of prompt rejection.

(2573) The court instructs the jury that, if the evidence

[13] Approved in Salmon v. Boykin, Carmer & Co., 66 Md. 541.

[14] Approved in Baltimore & O. R. Co. v. Brydon, for use of Davis & Co., 65 Md. 198.

shows that the defendants claimed in July, —, that they had rejected the apparatus and held it subject to the order of plaintiffs; and then continued to make monthly payments until November or December; that was evidence tending to show that the claims of defects were unfounded.[15]

Waiver of right to object to goods as second hand.

(2574) The court instructs the jury that defendants cannot rescind the contract on the ground that the apparatus shipped them was not new, and had been used by other parties prior to the sale, if they, after being informed by letter or otherwise that the apparatus shipped them had been used by other parties in 19—, continued to use the same.[16]

Waiver of defects—Use of soda fountain after knowledge of defect.

(2575) The court instructs the jury that, if the jury believe from the evidence that defendants kept and used the soda fountain and apparatus for three or more months, after they had knowledge of all the alleged defects and fraud complained of, they should find for plaintiff at least the amount of debt proven, less the value of repairing said defects.[17]

Duty to make complaint within a reasonable time—Duty to return goods.

(2576) The court instructs the jury that, if you find the goods were of such a kind and quality that no inspection could have disclosed the defects, and that these defects and imperfections could only be discovered by the particular use of the goods by the purchaser, or by those to whom he has sold them, then upon discovery of the same the purchaser would be required to notify the sender within a reasonable time thereof. You should determine whether com-

[15] Approved in Hodge & Williams v. Tufts, 115 Ala. 366.
[16] Approved in Hodge & Williams v. Tufts, 115 Ala. 366.
[17] Approved in Hodge & Williams v. Tufts, 115 Ala. 366.

plaint was made in a reasonable time, in view of all the evidence given you upon the subject of the sale of the belting and its use; and he would be entitled to recover back the amount he has paid in ignorance of the condition and quality of the goods, if they were entirely worthless and of no value. If they were of some value, and not returned; if they were worth returning; then the purchaser would be entitled to recover the difference in value between the price he paid for them, and the market value of the articles at the time he received them. If you find that this rubber belting was of any value, then you will determine it.[18]

Failure of goods to comply with contract—Duty to return or account for market value.

(2577) The court instructs the jury that the purchasers had the duty imposed upon them of notifying the seller of the condition of the goods and their refusal to accept them, or they could return them. If the purchasers keep them after they have made the discovery, they must account for them at their market value; that is, when their condition is discovered after payment made. If they were worthless entirely and of no value, it would not be necessary to return them. But the burden of proving such is the case, is on the defendants to show by a preponderance of evidence that the goods were of no value.[19]

III. Transition of Title.

Necessity of ascertaining quantity.

(2578) The court instructs the jury that it is a well settled rule of law that, in sales of personal property, when anything remains to be done to complete the contract, such as ascertaining quantity or delivering possession, the title does

[18] Approved in Gutta Percha & Rubber Mfg. Co. v. Wood, 84 Mich. 452.

[19] Approved in Gutta Percha & Rubber Mfg. Co. v. Wood, 84 Mich. 452.

not pass until these things are done; and if the jury believe from the evidence that the cigars described in the declaration, and alleged to have been sold by the plaintiff to the defendant, were in such condition at the time of their alleged purchase by the plaintiff; that something material to the contract, such as counting, boxing, stamping or delivery of possession remained undone; then, as against creditors, the title could not pass to plaintiff, and defendants are entitled to a verdict.[20]

Delivery without requiring payment.

(2579) The court instructs the jury that it is a general rule of law that when goods are sold,—the condition of payment being made, or some other condition precedent being performed, before or on delivery,—then an absolute and unconditional delivery of the goods, without requiring at the time of the delivery payment or performance, would be a waiver of such payment or performance as a condition precedent; and a complete title would pass to the purchaser, provided, that at the time of such delivery it was the intent of the parties that it should be absolute and unconditional delivery. Though it is important, it is not absolutely imperative that the vendor declare that he does not waive any condition of the sale at the time of a delivery to the vendee. The situation of the parties, the nature of the transaction, the presumption of honest dealing, and like considerations may be taken into account in determining whether any conditions of the sale have been waived.[21]

Placing of machinery in mill—Necessity of final adjustment.

(2580) The court instructs the jury that the time when the mill-owners erected the said mill, is a question of fact for the jury to determine under all the evidence given in the cause; but it should be deemed as erected, in contemplation of

[20] Straus v. Minzesheimer, 78 Ill. 492.

[21] Approved in Albright v. Brown, 23 Neb. 136.

law, when placed properly in position to perform the work intended, and left with the defendant as a performance of the contract read in evidence on the part of the plaintiffs, even though in some of its parts it was not yet strictly and skillfully adjusted.[22]

Delivery on condition.

(2581) The court instructs the jury that, if you should find that there was a delivery to plaintiff of the goods in question, but that such delivery was coupled with the condition that the property should not pass until the purchase price was paid; and if you further find that the purchase price as agreed upon was not paid, and that defendants repossessed themselves of the property; then, as a matter of law, it charges you that the conditions are not complied with on the part of the purchaser and if the seller has done all he agreed to do on his part the seller has a right to repossess himself of the property, and such repossession is a rescinding of the sale, and defendants would be entitled to recover.[23]

Right of seller to retake goods, where condition is not performed.

(2582) The court instructs the jury that it is a rule of law that a sale and a delivery of goods—on condition that the property is not to vest until the purchase money is paid or secured—does not pass the title to the purchaser until the condition is performed; and the vendor, in case the condition is not fulfilled, has a right to repossess himself of the goods, both as against the vendee or one purchasing from such vendee with notice. When goods are delivered to the vendee, the intention of the parties determines the interpretation to be given to the delivery.[24]

[22] Approved in Cook v. Flint, 2 Ind. App. 41.
[23] Approved in Albright v. Brown, 23 Neb. 136.
[24] Approved in Albright v. Brown, 23 Neb. 136.

Effect of unconditional delivery.

(2583) The court instructs the jury that, if, after a full consideration of all the evidence before you, you shall find that there was a delivery of the goods in question, and that such delivery was absolute and unconditional, and was by the parties so intended, then the property vested in the plaintiff, and he should be entitled to recover.[25]

Liability for loss before delivery.

(2584) The court instructs the jury that, if they believe from the evidence that the plaintiff sold to defendant —— hogs as alleged in the declaration; and that while the hogs were being driven from the plaintiff's farm to the defendant's farm, some of the hogs died because of the heat; then the jury are instructed that the question as to whether the defendant is liable for the entire number of hogs sold to him by the plaintiff, will depend upon whether, by the terms of the contract, the hogs were to be driven at the defendant's risk.[26]

IV. Warranties.

Representations constituting warranty.

(2585) The court instructs the jury that it is not necessary that a representation, in order to constitute a warranty, should be simultaneous with the conclusion of the bargain; but only that it should be made during the course of the dealing which leads to the bargain, and should then enter into the bargain as a part of it.[27]

(2586) The court instructs the jury that, if they believe from the evidence that S. was authorized by the plaintiffs, orally, to warrant to the purchasers of their fertilizers that they were as good as any other in the market of like price;

[25] Approved in Albright v. Brown, 23 Neb. 136.

[26] Nichols v. Mercer, 44 Ill. 250.

[27] Approved in Eureka Fertilizer Co. v. Baltimore Copper, Smelt. & Roll. Co., 78 Md. 179.

and that he warranted to the defendant B., when making sale of said fertilizers, that the said fertilizers were as good as any other in the market for the same price, dollar for dollar; and they further find from the evidence that the said fertilizers were not as warranted; then they should find for the defendant such damages as have resulted naturally from the breach of said warranty.[28]

(2587) The court instructs the jury that, if you believe from the evidence that defendant, A., represented to plaintiff, R., that the ——— in question was first class ———, equal in quality to any ——— made in this market; and that such representation was made by the defendant with the intention thereby of warranting the ——— to be of such quality and to induce plaintiff to buy the same; and that plaintiff purchased the said ———, relying upon such representations as the warranty of quality; and that at the time of purchasing the ——— they were not of the quality represented, but of a poor, inferior and bad quality; then your verdict will be for plaintiff.[29]

Necessity of use of the word warrant.

(2588) The court instructs the jury that, to constitute warranty, it is not necessary that the word "warranty" or any particular word or form of words should be used; but any representation of the quality or condition of the article sold, made by the seller to the purchaser for the purpose of assuring an intending purchaser of such condition or quality as a fact, and thereby to induce him to make the purchase, will be an express warranty, if accepted and relied on by the purchaser.[30]

Implied warranty from description.

(2589) The court instructs the jury, as a matter of law,

[28] Approved in Reese & Co. v. Bates, 94 Va. 321.

[29] Approved in Thorne v. McVeagh, 75 Ill. 81.

[30] Approved in Eureka Fertilizer Co. v. Baltimore Copper, Smelt. & Roll. Co., 78 Md. 179.

that if a person sells a commodity by a particular and well known market description, which commodity is not present at the time and place of the trade, and is not examined or seen by the purchaser, then, and in such case, the law implies a warranty on the part of the seller that the commodity is of a fair merchantable quality, corresponding to the description under which it is sold; and if the jury believe from the evidence that defendant sold to plaintiff "mess pork," and the words "mess pork" meant pork of a certain kind, then defendant was bound to deliver pork of that kind, unless the jury further believe from the evidence that by a custom or usage of the trade in which defendant was engaged no such implied warranty arose.[31]

Implied warranty on sale by manufacturer or sale by particular description.

(2590) The court instructs the jury that, if a manufacturer or dealer contracts to sell a known and described thing, although he may know the purchaser intends it for a specific use,—if he delivers the thing sold,—there is no implied warranty that it will answer, or is suitable for the specific use to which the purchaser intends applying it.[32]

(2591) The court instructs the jury that where a manufacturer or a dealer contracts to supply an article he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer; there is in that case an implied term of warranty that it shall be reasonably fit for the purpose to which it is be applied.[33]

Implied warranty on sale by sample.

(2592) The jury are instructed that it is one of the rec-

[31] Chicago Packing & Provision Co. v. Tilton, 87 Ill. 547.

[32] Gachet v. Warren, 72 Ala. 288; Chanter v. Hopkins, 4 Mees. & W. 399; Hoe v. Sanbone, 21 N. Y. 552; Bartlett v. Hoppock, 34 N. Y. 118; Dounce v. Dow, 64 N. Y. 411; Port Carbon Iron Co. v. Grove, 68 Pa. 149; Gossler v. Eagle Sugar Refinery Co., 103 Mass. 331.

[33] Gachet v. Warren, 72 Ala. 288; Pacific Guano Co. v. Mullen, 66 Ala. 582; Benj. Sales, § 157.

ognized rules of law, that in a sale of goods by sample, the vendor warrants the quality of the bulk to equal that of the sample. In such sale, there is also an implied condition that the buyer shall have a fair opportunity to compare the bulk with the sample. It must not be assumed however, that in all cases where a sample is exhibited, the sale is a sale by sample; for the vendor may show a sample, but decline to sell by it, and require the purchaser to inspect the bulk at his own risk.[34]

Implied warranty on purchase of goods previously purchased by sample.

(2593) The court instructs the jury that a purchaser who gives an order for articles manufactured by the vendor or seller, who has before that sold and delivered to the purchaser by sample like goods, and when the purchaser gives a subsequent order for like goods, such purchaser is entitled to rely upon the integrity and judgment of the seller in selling him goods to correspond with those before received in kind and quality, and to fill the order according to the expectation of the purchaser when it is made; and if the purchaser has no opportunity to examine and inspect them; and if the character of the goods is such that inspection would not afford him any opportunity of detecting any defect or fault in the goods; and he, relying upon the judgment and integrity of the seller, pays for them while he is ignorant of their true condition, and under the belief that they are of the kind and quality he had ordered; and if the seller knew the business of the purchaser and the use to which such goods are to be put and he does not send him the kind of goods ordered, but an inferior kind; and if you find that an inspection would not have disclosed the inferiority or imperfection of the goods received; then the payment made upon

[34] Approved in Proctor v. Spratley, 78 Va. 254.

receipt without examination would not be a voluntary payment.[35]

Implied warranty after opportunity of inspection.

(2594) The court instructs the jury, upon the part of defendant, that upon the sale and delivery of ——— to the buyer, there is no warranty on the part of the seller to the buyer—where the buyer had an opportunity of inspecting the same upon delivery—that the article sold was sound and merchantable, unless the seller, by express words, warrants the same to be such; or unless the jury believe further from the evidence that there is a known custom of the trade in which defendant was engaged, by which a warranty that the article sold was sound and merchantable, was implied, notwithstanding such opportunity of inspection by the buyer.[36]

Extent of implied warranty.

(2595) The court instructs the jury that an implied warranty is not that the article or thing sold shall be the best of its kind, or such as might have been represented at the time of the sale, but only that such article or thing shall be reasonable, and suitable for the purpose for which it was intended to be used.[37]

(2596) The court instructs the jury that, when one sells articles of personal property, he impliedly warrants that it is merchantable and reasonably suited to the use intended, and that the seller knows of no latent defects undiscovered. "Latent defects" means such defects as are hidden. The implied warranty, however, does not cover defects which can be discovered by ordinary prudence and caution. As to these, the law presumes the buyer to exercise his own judgment. If you believe that the consideration of the note sued on was

[35] Approved in Gutta Percha & Rubber Mfg. Co. v. Wood, 84 Mich. 452.

[36] Chicago Packing & Provision Co. v. Tilton, 87 Ill. 547.

[37] Approved in Hodge & Williams v. Tufts, 115 Ala. 366.

a lot of horses; that they were not at the time of the sale merchantable and reasonably suited to the use intended; and that they were so because of defects which were not discoverable by ordinary prudence; this would be a good defense to the note. If the evidence shows that the consideration of the note failed entirely, this would altogether defeat a recovery. If there was a partial failure, there should be an apportionment between the parties according to the facts of the case.[38]

Waiver of warranty by acceptance.

(2597) The court instructs the jury that, if the jury believe from all the evidence in this case that the sale of the peanuts by S. to the defendant was made by a sample, exhibited at the time of such sale; and that upon an inspection and comparison of the bulk of said peanuts with such sample, made by the defendant or his agent within a reasonable time after their delivery, it was ascertained that the bulk of such peanuts were inferior in quality to and did not correspond with such sample; and that the plaintiffs had notice thereof within a reasonable time; then they must find for the defendant, unless the jury believe further from the evidence that after the peanuts purchased by the defendant of the plaintiffs were received and inspected by the defendant or his agent, and the sample exhibited at the time of the sale compared with the bulk, that the said defendant personally or by his agent exercised any act of ownership over them, or did any act amounting to an acceptance of them; the said acceptance is a waiver of any objection to their quality, and the failure of their quality will not afterwards avail him as a defense, except in case of fraud; but the proof of such acceptance must be clear and unequivocal, and not founded upon or induced by a mistake as to the facts at the time of such reception by the agent; it is a question for the

[38] Approved in Hoffman v. Oates, 77 Ga. 701.

jury whether, under all the circumstances, the acts which the buyer or his agent does or forbears to do amount to an acceptance.[39]

(2598) The court instructs the jury that, if the jury believe from the evidence that the plaintiff intended by the exhibition of the samples to the defendant, taken in connection with all he said and did at the time the alleged contract of sale was made, to impress the defendant with the belief that he was selling by sample, and that the defendant believed he was purchasing by the sample so exhibited, then they must find for the defendant; unless they further believe from the evidence that the bulk did correspond in quality with the sample, or that the defendant has, by clear and unequivocal acts, accepted the peanuts after knowledge that the bulk did not correspond in quality with the sample.[40]

Burden of proof of warranty.

(2599) The court instructs the jury that, in so far as the defendant relies upon a warranty of quality of the property sold and a breach of the same, the burden of proving the warranty is upon the defendant; and unless it has proved both the warranty and the breach alleged by a preponderance of the evidence, it will not be entitled to any benefit therefrom in the suit.[41]

(2600) The court instructs the jury that the burden of proof, in this case, is upon the defendants to establish any warranty by the plaintiff respecting the quality of machinery sold by plaintiff to the defendants.[42]

Fulfillment of warranty.

(2601) The court instructs the jury that, if they believe from the evidence that there is a variety of oats known and designated in commerce by the name of "rust-proof oats";

[39] Approved in Proctor v. Spratley, 78 Va. 254.

[40] Approved in Proctor v. Spratley, 78 Va. 254.

[41] Approved in Tacoma Coal Co. v. Bradley, 2 Wash. 600.

[42] Approved in Adler v. Robert Portner Brewing Co., 65 Md. 27.

and that the defendant agreed and guaranteed to sell and deliver to plaintiff the "rust-proof oats"; and that the oats which he did deliver were the oats so known and designated; then there was no breach of contract on the part of the defendant; and the plaintiff is not entitled to recover, even though the jury may believe that the oats rusted.[43]

Warranty on sale of pork on board of trade.

(2602) The court instructs the jury that, if they believe from the evidence that the plaintiff went upon the board of trade and made contracts and traded with the members, he is bound by the rules, regulations and customs of said board, the same as if he had been a member thereof; and in that case, will not be permitted to plead his ignorance of said rules, regulations and customs as a reason for not being bound by them.[44]

V. Rescission.

Time in which to elect to rescind.

(2603) The court instructs the jury that two months or more after knowledge of the defects,—if there were defects in the apparatus,—would be a reasonable time in which defendants should make their election to rescind on account of such defects.[45]

Right of seller to recover goods—Purchase with intent not to pay.

(2604) The court instructs the jury that, if you believe from the evidence that on or about the —— day of ——, and the —— day of ——, 19—, S. was engaged in the boot and shoe business at W., I., and that at said times the said S. was insolvent; and that at said times he did purchase of the plaintiff any part or all of the goods sued for in this action; and that at the time of making the purchase of said

[43] Approved in Gachet v. Warren, 72 Ala. 288.
[44] Chicago Packing & Provision Co. v. Tilton, 87 Ill. 547.
[45] Approved in Hodge & Williams v. Tufts, 115 Ala. 366.

goods the said S. knew that he was insolvent and unable to pay therefor; and that the said S. purchased said goods from the plaintiff with the purpose and intention not to pay therefor, and for purpose of defrauding the plaintiff out of said goods; then you are told that, as a matter of law, the plaintiff would be entitled to recover such goods as you find from the evidence these defendants had in their possession at the time of the commencement of this suit, and were delivered to said S. under the purchases mentioned in this instruction.[46]

(2605) The court instructs the jury that in considering the question as to whether or not S. bought the goods with the intention and purpose of defrauding the plaintiff,—you are told that there are in law certain matters which are sometimes termed "badges of fraud"; that is, matters which, if shown, are usually considered as evidence tending to show fraud. Among these are unusual or extraordinary methods of conducting business, if shown. Any secrecy or concealment in said business, if shown, or any other unusual methods or acts connected with the transaction in question, if shown by the evidence, are proper to be considered when deciding whether fraud, in fact, existed in connection with the transaction. As applied to this case, if S., by his acts prior to or at the time of the sale intentionally induced plaintiff to believe that he intended to pay for the goods, and said S., in fact, did not intend to pay therefor; and the said S. induced this belief intending to deceive the plaintiff and induce him to sell the goods to him; and the plaintiff was thereby deceived, and was induced by this misrepresentation to make the sales, and would not have made them if defendant had not made this misrepresentation; then the debt was created by fraud of said S., and the plaintiff would be en-

[46] Approved in Phelps, Dodge & Palmer Co. v. Samson, 113 Iowa, 145.

titled to recover, provided you find that said S. was at the time of the sale insolvent.[47]

Necessity of return of notes delivered as part of purchase price.

(2606) The court instructs the jury as a matter of law that fraud destroys the contract, and that a fraudulent purchaser acquires no title to goods procured through false representations; and that, if a purchase of goods is effected by means of fraudulent representations on the part of the purchaser, known by the purchaser to be false, and which were relied upon by the seller, and in consequence of which he made the sale, the seller may maintain trover for them against the purchaser, without a previous demand; and if the purchaser in such case give a negotiable note or notes for the price of the goods so procured, the seller may maintain his action without a previous tender of the note, provided the note or notes have not been negotiated, and are produced at the trial to be surrendered to the defendant. And if the jury believe from the evidence in this case that, on or about the —— day of —— last, the defendant, R., made the representations and statements set forth in plaintiff's declaration; and that said R., by means thereof, knowing the same to be false and fraudulent, purchased and procured from the plaintiff, B., $— worth of liquors upon the terms and conditions and upon the security set forth in plaintiff's declaration; and that B., in making said sale and delivering said liquors, relied upon and believed the said statements and representations of R. to be true; and that B. would not have made the sale and parted with his goods if he had known or believed the said representations and statements were not true, and as stated by him to R. And if the jury further believe from the evidence that the said representations and statements were not true in point of fact, but on

[47] Approved in Phelps, Dodge & Palmer Co. v. Samson, 113 Iowa, 45.

the contrary thereof, that the same were false and fraudulent and known to be so by the defendant, and made with intent to procure from B. the liquors as aforesaid: then the court further instructs the jury as matter of law that in such case the defendant acquired no title to the property; and that B. may maintain this suit against him, without a previous demand or tender of the notes, provided he produces said notes and securities accompanying the same, on the trial, to be surrendered to the defendant; provided, also, the plaintiff has not, with a knowledge of the fraud (in case the jury shall believe from the evidence there was any fraud), done any act in affirmance of the original sale.[48]

Rescission on account of misrepresentation—Burden of proof.

(2607) The court instructs the jury that plaintiffs in this case can only be entitled to recover by proving the contract that they have set out in their declaration; that it devolves upon them to make out their case; that they must do so by a preponderance of testimony. And if the jury believe from the evidence that the defendants agreed to sell their hogs to plaintiffs for seven cents a pound, on condition that the price of hogs was on the decline on the —— day of —— (being the date of the contract,) and that such was the contract between them; then the jury will find for the defendants, if they further believe from the evidence, that hogs were not on the decline, but were, in fact, advancing in price; and it makes no difference, under such a state of facts, if from the evidence the jury believe them to have existed, whether the plaintiffs knew of the decline in the price of hogs or not.[49]

Rescission on account of misrepresentation as to market.

(2608) The court instructs the jury that, if they believe from the evidence that plaintiff, C., went to the residence

[48] Approved in Ryan v. Brant, 42 Ill. 78.

[49] Approved in Bird v. Forceman, 62 Ill. 212.

of B. to buy their hogs, and then proposed to give said B. seven cents per pound for said hogs, telling them that hogs were on the decline; and defendants, or one of them, told the plaintiff, C., that if hogs were on the decline at that time, they, the plaintiffs, could have them at seven cents per pound; and that they, the defendants, would deliver them at P. the next ——; and, if the jury further believe, from the evidence, that hogs were not, at that time, on the decline, but were really advancing in price: then the defendants were under no obligations to deliver the said hogs to the plaintiffs on such contract, and the verdict should be for defendants.[50]

Effect of intervention of rights of third party.

(2609) The court instructs the jury that a defrauded vendee has the right, within a reasonable time after the knowledge of fraud, to rescind the contract, unless he has with such knowledge affirmed the sale by express words or unequivocal acts, or, while he is deliberating, an innocent third party has acquired an interest in the property.[51]

Waiver of right to rescind.

(2610) If defendants knew of all the defects complained of in March or April, 19—, and with this knowledge kept and used the same until midsummer of that year or later, and paid their notes given for the purchase money until November, 19—; this would be as matter of law a waiver of their right to rescind the contract.[52]

Waiver of right to rescind by payments.

(2611) The court instructs the jury that, if the jury believe from the evidence that defendants were notified by letter or otherwise in the month of March, 19—, that the apparatus shipped them was second hand; and with this

[50] Approved in Bird v. Forceman, 62 Ill. 212.
[51] Approved in Proctor v. Spratley, 78 Va. 254.
[52] Approved in Hodge & Williams v. Tufts, 115 Ala. 366.

knowledge they used said apparatus until some time in the summer of said year, and made payments on the purchase money of said apparatus until November of said year; the acts on the part of said defendants would constitute a waiver of their right to rescind, on account of the property being second hand.[53]

Effect of renting portion of the property.

(2612) The court instructs the jury that, if the defendants, after they say they rejected the apparatus rented out a part of it to M., then they cannot now say that they rescinded the trade. It is too late.[54]

Rejection of goods—Failure to act in good faith.

(2613) The court instructs the jury that, if the jury shall find from the whole evidence that the action of the master of transportation and master of machinery of the defendant in rejecting the plaintiff's coal was not bona fide, then the plaintiff is not precluded by such rejection from recovering in this action.[55]

VI. Damages and Amount of Recovery.

Amount of recovery in action for purchase price.

(2614) The jury are instructed that, if the plaintiff in this case sold and furnished the materials claimed in his bill to the defendant; delivered them at the place where the building was being erected to the defendant or its agents or employees; and that the same were received and used in the building, then the jury will find a verdict for the plaintiff, and assess his damages at the value of the materials furnished.[56]

[53] Approved in Hodge & Williams v. Tufts, 115 Ala. 366.

[54] Approved in Hodge & Williams v. Tufts, 115 Ala. 366.

[55] Approved in Baltimore & O. R. Co. v. Brydon, for use of Davis & Co., 65 Md. 198.

[56] Approved in Presbyterian Church of New Boston v. Emerson, 66 Ill. 269.

Sufficiency of proof of compliance with contract.

(2615) The court instructs the jury that, if it appears from the greater weight of the evidence that the plaintiff constructed the apparatus in question in a good, workmanlike manner; and that, by the tests made of said apparatus by plaintiff and defendant, the same complied with all the terms of plaintiff's guaranty, to wit (enumerating the guaranties in the contract;) then and in that event the plaintiff would be entitled to recover the contract price.[57]

Measure of damages for failure to deliver goods.

(2616) The court instructs the jury that, if they believe from the evidence that said defendant unconditionally bargained with said plaintiffs on the —— day of ——, —, for the delivery to them on ———, the following day at P., his, the said defendant's twelve fat hogs; and that the defendant, without any legal excuse therefor, failed to deliver the same at the time and place agreed upon; then the measure of damages would be the difference between the contract price and the fair market value of said hogs at said P. on said ———.[58]

(2617) The court instructs the jury that, if they believe from the evidence that the defendants contracted with the plaintiffs to deliver to plaintiffs a certain number of fat hogs at the time and in the manner stated in plaintiffs' declaration; and also that plaintiffs were ready and willing to receive and pay for the goods at the time and place, and at the price agreed upon, as plaintiffs have in their declaration alleged; the defendants were bound to offer to deliver the hogs in accordance with the terms of the contract, or pay the damages occasioned by their non-performance or failure to deliver the said hogs.[59]

[57] Approved in Smith v. Independent School Dist. of Council Bluffs, 112 Iowa, 34.

[58] Kitzinger v. Sanborn, 70 Ill. 146.

[59] Approved in Bird v. Forceman, 62 Ill. 212.

Recovery of purchase money.

(2618) The court instructs the jury that, if you find from a preponderance of the evidence that the sale of the cattle was made; and the defendant without right prevented the cattle being transported to San Francisco, and unlawfully took them into his (defendant's) possession, and retains such possession as against plaintiff; then the plaintiff is entitled to recover from the defendant such portion of the purchase money as the plaintiff may have heretofore paid, and herein admitted to be $1000.[60]

Set-off of damages from breach of warranty.

(2619) The court instructs the jury that, if the jury shall find from the evidence in this case that the machinery mentioned as delivered to the defendant (in this case) by the plaintiff, were delivered upon the order of the defendants or either of them, and were the specified articles or pieces of machinery which it was agreed between the defendants, or either of them and the plaintiff, should be delivered by the plaintiff to the defendants; and that the price agreed to be paid by the defendants to the plaintiff for said articles was $1200, payable in equal installments at the expiration of three and four months from the date of said delivery; then the plaintiff is entitled to recover of the defendants the agreed price,—with such interest thereon as the jury may see fit to allow,—from the date of the expiration of said three and four months after delivery, up to the present; unless the jury shall further find that there was a warranty respecting the quality of the machinery sold and delivered by the plaintiff to the defendants, which warranty was fraudulently untrue on the part of the plaintiff, and which warranty formed part of the contract of sale between the plaintiff and defendants, and that said warranty has been broken by the plaintiff; and in that case

[60] Approved in Hockersmith v. Hanly, 29 Or. 27.

the jury is entitled to deduct from the plaintiff's claim, proved as aforesaid, the amount of money proved to have been expended by the defendants in bringing the said machinery up to the state in which they shall find it was warranted to be by the plaintiff at the time of sale.[61]

(2620) The court instructs the jury that, if they believe from the evidence that there was a breach of warranty on the part of plaintiff, the amount sued for, less the sum that the jury ascertain from the evidence it would have cost to have placed the apparatus in the condition which it was warranted to be, would be the amount of plaintiff's recovery.[62]

Set-off of breach of warranty when property is not returned.

(2621) The court instructs the jury that, in the case of the sale of chattels with a warranty expressed or implied, (in the absence of fraud on the part of the vendor,) if the thing purchased does not answer the terms of the warranty, the purchaser may return or offer to return the property within a reasonable time, and thereby defeat the right on the part of the vendor to recover any part of the purchase price agreed upon; or he may keep the property, and, when sued by the vendor for the price, may set up the breach of the warranty in recoupment of the plaintiff's damages; but in such action the vendor, notwithstanding the breach of warranty, may recover the value of the chattel,—if it has any value,—notwithstanding its unfitness for the uses for which it was purchased.[63]

[61] Approved in Adler v. Robert Porther Brewing Co., 65 Md. 27.

[62] Approved in Hodge & Williams v. Tufts, 115 Ala. 366.

[63] Approved in Warder v. Fisher, 48 Wis. 338; Perley v. Balch, 23 Pick. (Mass.) 284; Hunt v. Silk, 5 East, 449; Conner v. Henderson, 15 Mass. 319; Wynn v. Hiday, 2 Blackf. (Ind.) 123; Dill v. O'Ferrell, 45 Ind. 268; Poulton v. Lattimore, 9 B. & C. 259; Fairfield v. Madison Mfg. Co., 38 Wis. 347; Fish v. Tank, 12 Wis. 247; Bonnell v. Jacobs, 36 Wis. 59; Merrill v. Nightingale, 39 Wis. 247; Morehouse v. Comstock, 42 Wis. 626; Getty v. Rountree, 2 Pin. (Wis.) 379.

Set-off of damages for breach of warranty against notes given for purchase price.

(2622) The court instructs the jury that, if they believe that the plaintiff sold to the defendant the barge mentioned in the evidence, (for which the notes sued on were given,) and as an inducement to the defendant to make said purchase, represented that said barge was all right, and was in condition for service at once; and that the defendant, relying on said representations, agreed to purchase and did actually purchase and accept the same, and gave the said notes for the purchase money; and shall further believe that said barge was not all right and in condition for service at once, but on the contrary was unsound and unseaworthy; and in consequence of such unsoundness was, together with a valuable cargo, lost and damaged; then the defendant is entitled to recoup against plaintiff's claim on said notes the amount of damage (if any) sustained as a direct consequence of said breach of warranty.[64]

Effect of acceptance and voluntary payment.

(2623) The court instructs the jury that, if they find from the evidence that defendants, after the receipt of this belting by them, had an opportunity to inspect and examine and determine by such examination and inspection, the quality of the belting they received; and if defects could have been ascertained by examination and inspection thereof; and without doing so they voluntarily paid their bill; then they cannot have set off the amount they paid at that time.[65]

Agreements for settlement of claim for rebate.

(2624) The court instructs the jury that, if plaintiff accepted and received the apples—whose value is herein

[64] Approved in Eureka Fertilizer Co. v. Baltimore Copper, Smelt. & Roll. Co., 78 Md. 179.

[65] Approved in Gutta Percha & Rubber Mfg. Co. v. Wood, 84 Mich. 452.

sued for by defendant—without any objection or notice to defendant that the same or any portion thereof were deficient in either quality or quantity, grade, condition, or character, under the agreement of purchase (if any), until after the sale or disposition of them by plaintiff; then plaintiff is not entitled to any rebate or deduction at your hands from the price and value agreed to be paid by it for said apples, unless on claim made therefor upon defendant by plaintiff, defendant and plaintiff agreed on a settlement of the amount of such claim, and defendant thereupon promised to pay such sum so agreed on, and plaintiff on the faith of such agreement, paid said sum to G., who claimed the same of plaintiff.[66]

Amount of abatement for breach of warranty.

(2625) The court instructs the jury that, in ascertaining the extent of damages suffered by defendants (if any), the jury must look to all the evidence to ascertain what it would reasonably cost to put the apparatus in a condition reasonably suitable for the manufacture and dispensing of soda water beverages; and if the only evidence on that point is that it would not cost over $—, then that is the only abatement the defendants would be entitled to, and the plaintiff would be entitled to a verdict for balance of notes and interest.[67]

Recovery for minor defects in costly apparatus.

(2626) The court instructs the jury that, if the evidence reasonably satisfies the jury that the apparatus as a whole was costly and expensive, and was only defective in some minor respects; and they further believe from the evidence that such defects could be remedied and put in such condition as would make the apparatus reasonably suitable for the purposes intended; then the costs of putting

[66] Approved in Coombs Commission Co. v. Block, 130 Mo. 668.
[67] Approved in Hodge & Williams v. Tufts, 115 Ala. 366.

same in such condition would be the measure of defendant's damages.[68]

Recovery of cost of repairs.

(2627) The court instructs the jury that, even if the jury should find from the evidence that the apparatus was not suitably fitted for the purpose for which it was sold, then the measure of defendant's damage is the amount necessary to repair the apparatus as it may be shown to be defective.[69]

Measure of damages for breach of warranty.

(2628) The court instructs the jury that, if you find for the plaintiff, you will award plaintiff as damages the difference between what you believe from the evidence to be the actual value of the goods described in the declaration at the time of the sale, and what you believe from the evidence their value would have been, if they had been as they were represented in the warranty made by the defendant.[70]

Allowance of interest.

(2629) The court instructs the jury that, if the jury further believe from the evidence that the defendant agreed to pay ten per cent interest on the materials furnished after ——; then, if the jury further believe that any part of the materials were furnished and not paid for; they will calculate interest on the same from the date they were furnished after that date.[71]

Peremptory instruction for plaintiff in action for purchase price.

(2630) The court instructs the jury that the plaintiff in this case brings suit against defendants to recover for

[68] Approved in Hodge & Williams v. Tufts, 115 Ala. 366.

[69] Approved in Hodge & Williams v. Tufts, 115 Ala. 366.

[70] Approved in Ferguson v. Hosier, 58 Ind. 438.

[71] Approved in Presbyterian Church of New Boston v. Emerson, 66 Ill. 269.

a bill of goods sold sometime in the year —, and the plaintiff claims to recover the sum of — and interest thereon at — per cent from —. But the defendants claim a set off against the claim of plaintiff of —, and interest from —, which defendants claim they paid in ignorance of the quality of a certain portion of goods purchased from the plaintiff, and which is the subject of this suit. Now, the court charges the jury that it appears from the undisputed evidence in this case, that in the month of ——, the plaintiff sold and delivered to defendants, ———, at the request of defendants; and the court charges you that plaintiff is entitled to recover the value of the sum which in this case has been testified to as the sum of —, unless you find a set off in favor of defendants.[72]

CHAPTER CXII.

SEDUCTION.

Chastity of female, 2631, 2632.
Same—Actual chastity required, 2633.
Same—Reformation, 2634.
Seductive arts, 2635.
Promise of marriage, 2636.

Chastity of female.

(2631) The court instructs that, if they believe from the evidence that defendant had sexual intercourse with the prosecutrix with her consent on an occasion previous to that charged in the indictment, then prosecutrix was not at the time of such latter intercourse a chaste woman, and defendant must be acquitted.[1]

(2632) Although the jury may believe from the evidence that the prisoner had illicit connection with the prose-

[72] Approved in Gutta Percha & Rubber Mfg. Co. v. Wood, 84 Mich. 452.

[1] People v. Nelson, 153 N. Y. 90.

cutrix under promise of marriage and may have thought at the time that she was of chaste character, they must acquit, if they find that she was actually unchaste at the time.[2]

Same—Actual chastity required.

(2633) The court instructs, that to be of chaste character it is not sufficient that prosecutrix should enjoy a good reputation for chastity, but she must be actually chaste,—must never before have had illicit sexual intercourse with any man.[3]

Same—Reformation.

(2634) If the jury find that defendant had carnal intercourse with the prosecutrix at the time and place charged in the indictment, they may convict, though she may have had carnal intercourse with defendant previously, provided she had reformed and was chaste at the time of the commission of the offense.[4]

Seductive arts.

(2635) The jury are instructed that, not only must it be shown by the evidence that an act of sexual intercourse took place between defendant and prosecutrix, but they must be convinced by the evidence, beyond all reasonable doubt, that she was induced to submit thereto by some art, influence or promise held out or exercised by defendant. If prompted by her own lustful desires or lack of virtue she yielded to mere request, however urgent, it is not seduction.[5]

[2] Barker v. Commowealth, 90 Va. 820.

This instruction would be erroneous in a state where it is held that the burden is on the prosecution to prove chastity in the first instance.

[3] People v. Kenyon, 26 N. Y. 203.

[4] State v. Timmins, 4 Minn. 325; and see, State v. Carron, 18 Iowa, 372.

[5] State v. Fitzgerald, 63 Iowa, 268; State v. Reeves, 97 Mo. 668; People v. De Fore, 64 Mich. 693.

Promise of marriage.

(2636) The jury are instructed that it is not enough that there should have been an engagement of marriage between the defendant and the prosecutrix, followed by sexual intercourse between them; but the jury must be convinced by the evidence that the prosecutrix was induced by the existence of the marriage promise to submit to such intercourse; that between the promise and her consent to the intercourse, there was a relation of cause and effect.[6]

CHAPTER CXIII.

SET-OFF AND COUNTERCLAIM.

In general, 2637.
Burden of proof, 2638.

In general.

(2637) The court instructs the jury that, if they believe from the evidence that the defendant has proved the items claimed by him as a set-off, then the jury, if they find that the defendant is indebted to the plaintiff, should deduct from the claim of the plaintiff such sum as the jury may from the evidence believe has been proven; and if the jury further believe from the evidence that the items of set-off claimed by the defendant ———, exceed in amount the sum claimed by the plaintiff, then the jury should find a verdict for the defendant for such sum as the evidence shows that the defendant has proved himself entitled to recover from the plaintiff over and above the just claim of the plaintiff against the defendant.[1]

[6] Carney v. People, 79 Ala. 14.

[1] Rolfe v. Rich, 149 Ill. 436. In the above instruction, it would be error to require the defendant to show the amount of his claim to the satisfaction of the jury, as this imposes a higher degree of proof than the law requires.

Burden of proof.

(2638) The court instructs the jury that as to the off-set made by the defendant to the claim set up by the plaintiff (for rent sued for), the burden of proof is on the defendant, and that he must establish the existence and validity of such off-sets by a preponderance of the evidence; and the jury are instructed that upon the question of such off-set, the terms of the leasing of plaintiff's farm are material, and plaintiff must prove to the satisfaction of the jury by a preponderance of the evidence that the terms of the lease were such as plaintiff claimed them to be; and if the jury shall find that the evidence preponderates in favor of defendant or is equally balanced; then the law is for the defendant, and plaintiff cannot recover.[2]

CHAPTER CXIV.

STREET RAILWAYS.

I. In General.

Care in general, 2639, 2640.
Relative rights and duties of street railroads and persons and vehicles in street, 2641-2644.
Warning signals, 2645, 2646.
Ordinances relating to operation of street railways, 2647-2651.
Injuries to pedestrians because of defects in road bed, 2652.
Right of motorman to presume that crossing would be safely made, 2653, 2654.
Collision with fire wagon, 2655, 2656.
Unavoidable accidents, 2657-2660.
Duty to slow down on approach to crowd, 2661.
Injuries caused by defective bridge, 2662.
Accident to vehicle at side of track, 2663.
Sufficiency of notice of broken wire, 2664.
Ejection of trespasser, 2665.
Injuries to passenger on railroad train caused by falling trolley wire, 2666.

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[2] East v. Crow, 70 Ill. 91.

Injuries to boys stealing rides, 2667-2671.
Injuries to persons by sparks from train on elevated railroad, 2672.
Contributory negligence, 2673-2679.
Same—Errors of judgment, 2680.
Same—Duty to look and listen, 2681-2684.
Same—Children, 2685-2688.
Same—Acts under excitement, 2689.
Same—Intoxicated person, 2690.
Same—Violation of laws by company as excuse for want of care by injured person, 2691, 2692.
Same—Injuries avoidable notwithstanding contributory negligence, 2693-2697.

II. As Carrier.

Degree of care required, 2698, 2699.
Liability toward person not a passenger, 2700, 2701.
Persons who are passengers, 2702-2705.
Rights of person before payment of fare, 2706.
Reasonableness of carrier's rules, 2707.
Reasonableness of rule providing that car may start without signal from conductor, 2708.
Injury to passenger by passing car, 2709, 2710.
Injury received from collision with wagon near track, 2711.
Liability to passenger injured by broken trolley wire, 2712, 2713.
Use of fractious horses, 2714.
Protection of passenger en route to seat, 2715-2717.
Starting before passenger has reached place of safety, 2718.
Starting while passenger is alighting, 2719, 2720.
Duty of conductor before giving starting signal, 2721.
Necessity of conductor's knowledge that passenger is alighting, 2722.
Right of motorman to start on signal from person other than conductor, 2723, 2724.
Definition of contributory negligence, 2725.
Contributory negligence generally, 2726.
Duty of ordinary care where passenger is guilty of contributory negligence, 2727.
Doctrine of comparative negligence, 2728.
Right of passenger to adopt ordinary measures for his safety, 2729.
Doctrine of remote and proximate cause, 2730.
Duty of passenger to hold to strap, 2731, 2732.
Arising from seat and preparing to alight before car has stopped, 2733.
Alighting from car in motion, 2734.

Getting off car in motion to escape assault, 2735.
Alighting from car in motion—Consideration of rate of speed, 2736.
Alighting from car which has stopped on the wrong side of the street, 2737-2739.
Attempting to board moving car, 2740
Riding in dangerous and improper place, 2741.
Passenger surrendering seat to lady and standing on platform, 2742.
Riding on platform contrary to rule, 2743.
Duty of passenger to take notice of rules as to stops, 2744.
Instructions of persons in charge of the car as preventing liability for contributory negligence, 2745.
Protection of passenger from trains on parallel tracks, 2746.

I. In General.

Care in general.

(2639) The court instructs the jury that it is the duty of the railroad company to endeavor to avoid injuring a party traversing the street. It is the duty of the party traversing the street to look out for himself, and to exercise ordinary care for his own protection. To authorize a recovery by plaintiff, it must appear that he exercised ordinary care to avoid the injury complained of; that is, that he acted with ordinary prudence under the circumstances.[1]

(2640) The court instructs the jury that the basis of this action is "negligence", which is defined by the law to be the omitting to do something that a reasonably prudent person would do, or the doing of something that such person would not do. Under the circumstances of this case, and as applied to this case, if you find from the evidence that the defendant, by its employees, has omitted to do something that a reasonably prudent person would do, or has done something that such person would not do, you would be warranted in finding that the defendant is guilty of negligence; and if you find that plaintiff, or the driver of the vehicle in question, has done something, or omitted

1 Approved in Clark v. Bennett, 123 Cal. 275.

to do something, which directly contributed to the collision and injury, then you will be warranted in finding such person or persons guilty of contributory negligence. In relation to the care required of each party, you will only hold them to the exercise of ordinary care, which consists in doing everything which a person of ordinary care and prudence would do, and omitting to do everything which a person of like care and diligence would omit to do.[2]

Relative rights and duties of street railroads and persons and vehicles in street.

(2641) The court instructs the jury that you will recollect that this railroad was on the public street, and prima facie all persons have a right to be on the street for all lawful purposes; and the fact that this is a public street and that all persons, old and young, adults and infants, have a right to be on the same, ought to impose upon the driver and conductor of a street car vigilance in looking out for dangers and guarding against accidents and injuries to persons and things.[3]

(2642) The court instructs the jury that the defendant is only required to use ordinary care in the operation of its cars, and the plaintiff is required to use the same degree of care—that is, ordinary care—in the use of the streets, and in crossing or going upon the track of the defendant. By ordinary care is meant such care as an ordinarily prudent person would use under the particular circumstances involved.[4]

(2643) The court instructs the jury that it is conceded that ——— street, where the accident occurred, is a public highway. That being true, the plaintiff had as much

[2] Approved in Hart v. Cedar Rapids & M. C. Ry. Co., 109 Iowa, 631.

[3] Approved in Etherington v. Prospect Park & C. I. R. Co., 88 N. Y. 641.

[4] Approved in Traver v. Spokane St. Ry. Co., 25 Wash. 225.

right to be upon and travel over the same, and every portion thereof, as the street car company. Their rights were equal and mutual in that respect, with this qualification, however,—that when both desired to pass a given point at the same time, it is the traveler's duty to yield the right of way to the street car, as, in the very nature of the case, he is able to pass over other portions of the highway and the street car is not. With this exception and qualification, their rights are equal; and in this connection it is proper to say that plaintiff was not bound to pass around the truck or wagon in front of him on the left rather than the right, over the street car track, provided a man of ordinary prudence, under the circumstances, as appeared to the plaintiff at the time, might have pursued the course he did. It is to be remembered, also, that they were both under obligations to exercise those rights with reasonable care, so as to prevent accidents to themselves and the public generally.[5]

(2644) The jury are instructed that by reason of its convenience to the public as a carrier of passengers, and because of the inability of its cars to turn out, a street railway company is invested with the right of way over other vehicles over the portion of street occupied by its tracks, and it is the duty of the drivers of such vehicles to turn out and allow its cars to pass, and to use care not to obstruct and delay the same; and if the jury believe from the evidence that the plaintiff, while neglecting such duty and failing thereby to use ordinary care for his own safety, was injured, then he cannot recover in this case.[6]

Warning signals.

(2645) The court instructs the jury if you believe from the evidence that, as the train was approaching T. street, the gripman rang the bell, and it could be heard at the north-

[5] Approved in Traver v. Spokane St. Ry. Co., 25 Wash. 225.

[6] Approved in North Chicago Electric R. Co. v. Peuser, 190 Ill. 67.

east corner of T. and M. streets,—the court instructs you that he has performed his whole duty under the allegations of negligence in that regard and under the law, and he was not required to be ringing it as he was crossing T. street and approaching the east crossing, and you must find that allegation of negligence concerning the not ringing of the bell in favor of the defendant; and the court further instructs you that all the evidence in this case shows that the child, H., was on the pavement in the crowd; and if the jury believe from the evidence that the gripman and conductor were keeping a vigilant watch for all persons on foot, especially children, as mentioned in these instructions, as the train was crossing T. street and approaching the east crossing, and that as soon as the crowd surged or rushed toward the track the gripman stopped the train in the shortest time and space possible under the circumstances; then your verdict must be for the defendant, notwithstanding the gripman did not notice the boy as he ran from the pavement and onto the track or thereafter.[7]

(2646) The court instructs the jury that it was the duty of defendant's gripman to sound his gong or bell when approaching ——— street, so as to give notice to persons desiring to cross said street of the approach of the train of cars; and if you find from the evidence that said gripman failed to sound his gong or bell, or give any other warning, when approaching said street, and that, but for his failure to so sound his gong or bell or give such warning, the accident complained of would not have happened; your verdict should be for the plaintiffs, unless you also find from the evidence that ———, at the time she was killed by defendant's cars, was not using that degree of care in going upon defendant's track which, in the ordinary experience

[7] Hogan v. Citizens' Ry. Co., 150 Mo. 36.

of mankind, was to be expected of a girl of her age and capacity under the circumstances shown in the evidence.[8]

Ordinances relating to operation of street railways.

(2647) The court instructs the jury that, if you find that the car which struck the plaintiff's buggy at the time of or just previous to the collision was being run at a greater rate of speed than eight miles an hour, which is the limit under the ordinance of the city of ———, you would be justified in finding the defendant guilty of negligence in running the car at such rate of speed; and, if you further find that such negligence caused the injury complained of, you should find for the plaintiff, unless he was guilty of contributory negligence.[9]

(2648) The court instructs the jury that by the terms of the ordinance (No. ——), read in evidence, the defendant's motorman, conductor or other persons in charge of its car, mentioned in evidence, were bound to keep a vigilant watch for vehicles moving toward defendant's track; and upon the first appearance of danger to such vehicle, the person or persons in charge of said car were bound to stop said car within the shortest time and space possible; and a failure to keep such vigilant watch and to stop said car, (if you find from the evidence that defendant's servants, agents or employees did so fail,) was negligence upon the part of defendant.[10]

(2649) The court instructs the jury that it is a question of fact for you to say, under the evidence in this case, whether or not the defendant has violated the provisions of the ordinance giving it a right of way through certain streets of the city of ———, or, in fact, of any of the ordinances that

[8] Approved in Schmidt v. St. Louis R. Co., 22 Am. & Eng. Ry. Cas. (N. S.) 711.

[9] Approved in Traver v. Spokane St. Ry. Co., 25 Wash. 225.

[10] Approved in Guinney v. Southern Electric R. Co., 25 Am. & Eng. Ry. Cas. (N. S.) 820.

have been introduced in evidence. I charge you, however, that if you find from the evidence that any of the provisions of the city ordinances have been violated, and that the injury complained of resulted from such violation, then such violation is a circumstance from which negligence may be inferred.[11]

(2650) The court instructs the jury that, if the defendant was engaged in the business of transporting passengers for hire from one point to another within the city of ———, on or about the —— day of ——, 19—, then, by ordinance No. ——, read in evidence, it became the duty of the gripman in charge of the gripcar to keep a vigilant watch for persons on foot, especially for children, either on its track or moving toward it; and on the first appearance of danger to such person or child, it was the duty of the gripman to stop the car in his charge in the shortest time and space possible under the circumstances.[12]

(2651) The court instructs the jury that, under the ordinance of the city of S. (number ——,) which has been read in evidence, the defendant company was entitled to operate its cars at a rate of speed not greater than fifteen miles per hour, at the point where the injury occurred of which plaintiff complains; but, if from the evidence the jury believe that the defendant's servants were at the time of the accident running the car at a greater rate of speed than fifteen miles an hour, they may take such fact (if they believe it to be true) into consideration in determining whether or not the defendant's servants were guilty of negligence as defined in these instructions.[13]

Injuries to pedestrians because of defects in road bed.

(2652) The court instructs the jury that the defendants

[11] Approved in Brasington v. South Bound R. Co., 24 Am. & Eng. Ry. Cas. (N. S.) 552.

[12] Approved in Hogan v. Citizens' Ry. Co., 150 Mo. 36.

[13] Approved in Ruschenberg v. Southern Electric R. Co., 161 Mo. 70.

must use their railway in conformity to the right of the city to make suitable drainage. The plaintiff, as I have already stated, alleged and has attempted to prove that the depression or drainage was in a defective condition and out of repair, and thereby the street was out of repair, and being out of repair the rails of the railway were in such condition that the plaintiff tripped over them and was injured. No matter who constructed the drain or controlled it, or for what purpose it was used, it was the duty of the defendants to keep it in repair; and if, in consequence of its being out of repair, the plaintiff was injured, the defendants were negligent.[14]

Right of motorman to presume that crossing would be safely made.

(2653) The court instructs the jury that if plaintiff, T., was not in imminent peril at the time he drove upon the track or attempted to cross the track of the defendant, the motorman had a right to presume that he would pass on over and off the track, out of the way; and the motorman was not guilty of negligence in failing to stop the car, in either of the events just mentioned, until the peril of the plaintiff became imminent.[15]

(2654) The court instructs the jury that if a person be seen upon the track of defendant's electric street railway, who is apparently capable of taking care of himself, the motorman may assume that such person will leave the track before the car reaches him; and this presumption may be indulged in so long as the danger of injuring him does not become imminent; and it is not necessary for a motorman to slacken the speed of the car until such danger becomes imminent.[16]

[14] Approved in Campbell v. Frankford, etc., Ry. Co., 139 Pa. St. 522.
[15] Approved in Traver v. Spokane St. Ry. Co., 25 Wash. 225.
[16] Approved in Traver v. Spokane St. Ry. Co., 25 Wash. 225.

Collision with fire wagon.

(2655) The jury are further instructed that, if they believe from the evidence that, when the horses of the truck came in sight of persons on the defendant's car, the said car was at such a distance from the point of collision that the accident might have been averted but for the want of a better appliance in use on other roads, or the crowding on the platform of passengers, preventing the motorman's use of his machinery; then the defendant company was guilty of negligence, and the jury must find for the plaintiff, even though they believe that the motorman on the car did all in his power to stop his car, unless they believe that the negligence of plaintiff or tillerman contributed to the accident.[17]

(2656) The court instructs the jury that by the terms of ordinance No. ——, read in evidence, the person or persons in charge of defendant's car, mentioned in the evidence, were required to give to the fuel wagon driven by G. (if you find from the evidence that said fuel wagon was a part of the fire apparatus of the city of S.) the right of way upon the street over which it was passing; (if you find from the evidence said fuel wagon was going upon said street in response to an alarm of fire) and if, from the evidence, you find that the person or persons in charge of said car either carelessly or wantonly obstructed or interfered with said fuel wagon while going to a fire, such conduct on the part of said person or persons is negligence on the part of defendant.[18]

Unavoidable accidents.

(2657) The court also instructs the jury that, if from the evidence they believe that the motorman of the car had no warning of the approach of the wagon, nor could have

[17] Richmond Ry. & Electric Co. v. Garthright, 92 Va. 627.

[18] Approved in Guinney v. Southern Electric R. Co., 25 Am. & Eng. Ry. Cas. (N. S.) 820.

known thereof by keeping a vigilant watch, as indicated in other instructions given, regard being had to the circumstances and surroundings until both the car and the wagon had reached the intersection of S. and G. streets; and the jury also believe that the wagon and car were then both going at such a speed that it was impossible for defendant's motoneer to avoid a collision between them; then the jury should find a verdict for the defendant.[19]

(2658) The court instructs the jury that, if the collision between the plaintiff and the car of the defendant was unavoidable, then your verdict must be for the defendant.[20]

(2659) The court instructs the jury that an accident may happen and a person be injured or killed therein, that is not caused by the negligence of any person connected therewith; and if the jury believe from the evidence that the death of the child, ———, was the result of such mere accident or misadventure, then your verdict must be for the defendant.[21]

(2660) The court instructs the jury that, if they believe that the car of the defendant was running at a moderate and proper rate of speed; and if, at the time the child first started to cross the tracks, the car was too close to the place where the child was struck and run over; that it was impossible for the car, under any circumstances, to be stopped before running over the child; that, then, the verdict should be for the defendant.[22]

Duty to slow down on approach to crowd.

(2661) The court instructs the jury that, though there was a crowd of people at the northeast corner of ——— street, the gripman was not required, under the allegations

[19] Approved in Guinney v. Southern Electric R. Co., 25 Am. & Eng. Ry. Cas. (N. S.) 820.

[20] Approved in Traver v. Spokane St. Ry. Co., 25 Wash. 225.

[21] Hogan v. Citizens' Ry. Co., 150 Mo. 36.

[22] Approved in Ehrmann v. Nassau Electric R. Co., 23 App. Div. 21.

of the petition and the law, to slow down his train to one, two, or three, or four, or five, or six miles an hour, or to stop it, or try to stop it, before the rush of the people towards the track; and the jury must not impute any negligence to the gripman because he did not stop, or try to stop, or was not running very slowly, before the rush of the crowd occurred, or the first appearance of danger.[23]

Injuries caused by defective bridge.

(2662) The court instructs the jury that, if you believe from the evidence that the defendant permitted said bridge to become and remain out of repair to such an extent that it was not reasonably safe for use by the public to travel over, and that plaintiff's injuries, if any he received, were proximately caused by said bridge being out of repair; and if you find from the evidence that the same was out of repair, and not in a reasonably safe condition for use by the public; then you will find for the plaintiff.[24]

Accident to vehicle at side of track.

(2663) The court instructs the jury that, if the wagon was standing on the side of the street, far enough from the car to pass by without striking, and was not moving when the car came within the distance, so that the motorman could see it, and within the distance that it was possible for him to stop; then the motorman had a right to presume that the wagon, which was thus standing still by the sidewalk would so remain, and he had a right to go on; and if, when the car got near the horses, they became scared and backed the wagon into the car, it was an accident, something the defendant could not have foreseen, and was not bound to see it. In that case the plaintiff could not recover.[25]

[23] Approved in Hogan v. Citizens' Ry. Co., 150 Mo. 36.

[24] Approved in Denison & P. S. Ry. Co. v. Foster, 26 Am. & Eng. Ry. Cas. (N. S.) 576.

[25] Approved in Higgins v. Wilmington City Ry. Co., 1 Marvel (Del.) 352.

Sufficiency of notice of broken wire.

(2664) The court instructs the jury that, if they find that the duties of the motorman and conductor were confined to the running of their car and the reporting of accidents, then notice to them of the sagging of the wire was not notice to the company; and if you further find that the accident was due to an uncommon or unusual cause, and that before its officer had a reasonable opportunity to give instructions the motorman and conductor went to the C. street crossing to guard the crossing; then, whether they did what they should have done in the way of warning plaintiff or not, the plaintiff cannot recover, and it will be your duty to find for the defendant, because, under such circumstances, what they did was of their own accord, and if there was any fault upon their part it cannot be charged to the defendant; for, if the accident occurred from an unusual and uncommon cause, the occurrence of which might not reasonably have been expected, no duty arose upon the part of the defendant until those of its officers and agents in authority had notice of the accident, and reasonable time thereafter to take precautions against any resulting danger.[26]

Ejection of trespasser.

(2665) The court instructs the jury that the fact that a person is a trespasser in boarding a car does not lawfully expose him to ejection by unusual means, nor license the company or its servants to unnecessarily inflict upon him bodily injury; and if you believe from the evidence that plaintiff was on the car as a trespasser; and you further believe from the evidence that the force used in ejecting him was excessive and a menace to life and limb; and you further believe that this excessive force caused the injury; then you will find for the plaintiff.[27]

[26] Approved in Read v. City & Suburban Ry. Co., 26 Am. & Eng. Ry. Cas. (N. S.) 278.

[27] Amato v. 6th Ave. R. Co., 59 N. Y. St. Rep. 674.

Injuries to passenger on railroad train caused by falling trolley wire.

(2666) The court instructs the jury that, although they may believe from the evidence in this cause that the said defendant company was guilty of negligence in the manner of constructing or maintaining its electric wire over and above the track of the ——— Railway Company; still plaintiff had no right to attempt to pass from one car to another while the cars were passing under the said wire, if in so doing he increased the danger of an accident from the said wire; and if from the evidence in the case they believe that the said plaintiff did attempt to pass from one car to another while passing under said wire, and by so doing did increase the danger and chance of the accident, he cannot recover in this case, and the jury must find for the defendant.[28]

Injuries to boys stealing rides.

(2667) The court instructs the jury that, if they shall believe from the evidence that the plaintiff was injured by jumping from a moving train of the defendant whilst being propelled through the streets of the city of ———, at the unlawful rate of speed of from ten to twelve miles per hour; and that the plaintiff's act of jumping from the train was caused by the orders of the defendant's motorman or conductor in charge of the train; then they may find for the plaintiff, provided the jury shall believe that the plaintiff, by reason of his age and want of judgment and discretion, was unable to exercise sufficient care and caution to resist the orders of the defendant's said motorman or conductor.[29]

(2668) The court instructs the jury that the conduct of an infant is not of necessity to be judged by the same rule which governs that of an adult. That, while it is the general rule in regard to an adult or grown person, that to entitle him

[28] Approved in Danville Street Car Co. v. Watkins, 97 Va. 713.

[29] Approved in Washington, A. & Mt. V. Electric Ry. Co. v. Quayle, 95 Va. 741.

to recover damages for any injury resulting from the fault or negligence of another he must have been free from fault, such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to his maturity and capacity wholly; and this is to be determined by the circumstances of the case and the evidence before the jury.[30]

(2669) The court instructs the jury that, if plaintiff at the time of the injury was a child of the tender age of thirteen years, and was riding upon the defendant's car, in the city of ———, whilst the same was traveling at a fast rate of speed then it was the duty of the defendant's motorman in charge of said train to have reduced the speed of said train, before ordering the plaintiff to leave the same, to such a rate of speed as the plaintiff might depart from the train with safety, notwithstanding the jury may believe that the plaintiff was at the time a trespasser upon the defendant's car.[31]

(2670) The court instructs the jury that, although they may believe from the evidence that the motorman called to the plaintiff and his companions to get off the car; yet, to entitle the plaintiff to recover in this action, the jury must believe that said call of the motorman was of such a threatening character as to justify the belief in the mind of the plaintiff, taking into consideration his age, that the motorman intended to do him bodily harm, or to eject him from the said car while it was in motion; and the plaintiff, through fear of such threat, jumped from the car and was injured; and that the jury must further believe that it was within the scope of the duty of said motorman to order the plaintiff to get off of said car.[32]

[30] Approved in Washington, A. & Mt. V. Electric Ry. Co. v. Quayle, 95 Va. 741.

[31] Approved in Washington, A. & Mt. V. Electric Ry. Co. v. Quayle, 95 Va. 741.

[32] Approved in Washington, A. & Mt. V. Electric Ry. Co. v. Quayle, 95 Va. 741.

(2671) The court instructs the jury that, although they may find from the evidence that at the time of the accident to the plaintiff defendant's train was running at a greater rate of speed than five miles an hour; that would not justify a recovery in this case in favor of the plaintiff, unless the jury further find that the plaintiff, taking into consideration his age and experience and understanding, by reason of the threatening language of the motorman, had reasonable ground for believing that the motorman intended to inflict physical violence upon the plaintiff, or to eject him from the car, or so terrorized the plaintiff as to compel him, against his will, to jump from the car.[33]

Injuries to persons by sparks from train on elevated railroad.

(2672) The court instructs the jury that the defendants were authorized to use the particular means which they have adopted and were then using for the purpose of a motor to run their cars; they had their election, and it was not negligence on their part if they elected to use that which the law permitted them to, provided they used it with due care, prudence, caution and discretion. I charge you that it is their duty to operate their roads with such care, prudence and caution, as an ordinarily prudent person would exercise to prevent any injury being sustained by others in consequence of the manner in which they operate their roads or exercise their rights. The liability to make reparation for an injury by negligence, is founded upon an original and moral duty incumbent upon every person so to conduct himself or exercise his own rights as not to injure another; and it follows that it is the duty of the defendants to take all precautions within the range of possibility to prevent injury to others from the operation of their roads; it is their duty to adopt all the means which

[33] Approved in Washington, A. & Mt. V. Electric Ry. Co. v. Quayle, 95 Va. 741.

modern science, discovery and invention afford, and all the facilities of the age within their power, in the operation of their roads, that they may so exercise their rights as not to cause injury to others.[34]

Contributory negligence.

(2673) The court instructs the jury, that notwithstanding you should find that the defendant was guilty of negligence in the operation of its car; yet, if you further find that the accident or the injury to the plaintiff would not have happened, except for the negligence or failure to use ordinary care upon the part of the plaintiff; then your verdict must be for the defendant.[35]

(2674) The court instructs the jury that, if plaintiff was guilty of any act of negligence which directly contributed to his injury, or was guilty of any lack of ordinary care on his part, whether the act be an active one or an omission to do what he ought to have done under the circumstances; and such lack of care, act or omission contributed to the accident, and without which the accident would not have occurred; then you cannot go further and apportion the accident or injury, but the plaintiff's contributory negligence in such case defeats recovery, and your verdict must be for the defendant.[36]

(2675) The court instructs the jury that the defendant company, at the place where the accident happened and the collision occurred, had the preference and the superior right to the use of the track; and that it was the duty of the plaintiff not to obstruct the use of said track or the operation of the cars thereon; and it was his duty to turn out to allow such street car to pass, if he was driving upon the track; and it was his duty to remain off the track, and not attempt to cross the same in front of a moving car, except at a safe

[34] Burke v. Manhattan Ry. Co., 13 Daly, 75.

[35] Approved in Traver v. Spokane St. Ry. Co., 25 Wash. 225.

[36] Approved in Traver v. Spokane St. Ry. Co., 25 Wash. 225.

distance therefrom; and a failure in either of these respects constitutes contributory negligence and defeats recovery, and entitles defendant to a verdict.[37]

(2676) The court instructs the jury that, if they believe from the evidence that both the plaintiff and the servant of defendant operating its car were equally guilty of negligence which directly contributed to the injury of said plaintiff, then the verdict should be for the defendant.[38]

(2677) The court instructs the jury that, if the plaintiff saw the approaching car and did not take proper steps to avoid it, he is chargeable with negligence. One crossing a street railroad track is not at liberty to take even doubtful chances in crossing the streets in face of danger, or of reliance on a successful attempt of the motorman to stop the car.[39]

(2678) The court instructs the jury that, if you find from the evidence that the car was running at a moderate rate of speed, and that the bell or gong had been sounded; and that the plaintiff suddenly and without warning, and under circumstances which were not reasonably to be expected, drove upon or attempted to cross the track of the defendant in close proximity to the car of the defendant, and at a time when it was not prudent to do so; then, and in that event, the plaintiff would not be exercising ordinary care and prudence.[40]

(2679) The court instructs the jury that, if the place where the accident occurred were well lighted, then it is for the jury to say whether a person using ordinary care and watchfulness could have tripped over the obstruction or not. If it were dark,—then there was a greater care and greater watchfulness required by any one who attempted to cross the street at that particular place. If the plaintiff did

[37] Approved in Traver v. Spokane St. Ry. Co., 25 Wash. 225.

[38] Approved in Guinney v. Southern Electric R. Co., 25 Am. & Eng. Ry. Cas. (N. S.) 820.

[39] Harvey v. Nassau Electric R. Co., 35 App. Div. 307.

[40] Approved in Traver v. Spokane St. Ry. Co., 25 Wash. 225.

not use all the care and watchfulness that the circumstances required, she was negligent and cannot recover, if her negligence contributed to the accident. She was required to use all the care and watchfulness which a person ordinarily careful would have used under the circumstances.[41]

Same—Errors of judgment.

(2680) The court instructs the jury that, if the plaintiff thought he had time to cross the track of the defendant—if he was attempting to cross the track—before the car of the defendant would reach him, and did not have sufficient time to do so, then it was error in judgment on the part of plaintiff, and he cannot recover; and your verdict should be for the defendant.[42]

Same—Duty to look and listen.

(2681) The court instructs the jury that ordinary prudence and common sense suggest to every one who is aware of the character and operation of electric street cars that it is dangerous to pass in front of them at a short distance while in motion; and one who does so without looking and listening, when, if he had looked and listened, he could have discovered the car, is guilty of contributory negligence, and cannot recover; and if you find that had plaintiff looked and listened he could have discovered the car, and thus have avoided the accident and injury, and that he failed to do so, your verdict must be for the defendant.[43]

(2682) The court instructs the jury that, if the plaintiff failed to look and listen and stop, if necessary, or take any reasonable precaution whatever to ascertain whether a car was coming upon the track of the defendant, then, and in that event, it was negligence upon the part of the plaintiff to drive upon or attempt to cross the track of the

[41] Approved in Campbell v. Frankford, etc., Ry. Co., 139 Pa. St. 522.

[42] Approved in Traver v. Spokane St. Ry. Co., 25 Wash. 225.

[43] Approved in Traver v. Spokane St. Ry. Co., 25 Wash. 225.

defendant, if the car of the defendant was in close and dangerous distance of the plaintiff.[44]

(2683) The court instructs that, if, at the time the plaintiff started to cross the street and left the sidewalk, the situation and surrounding circumstances were such as to require a person in the exercise of ordinary prudence to look up ——— street to ascertain whether there was a car approaching and he failed to do so, then he was negligent; and if such negligence contributed to this injury, he cannot recover.[45]

(2684) The court instructs the jury that, if you believe from the evidence that plaintiff started to cross the track of defendant's street railway in sufficient time to have safely passed, and that he stumbled, then you are instructed that his failure to look and listen before crossing was not material. The rule requiring care and diligence on the part of one crossing a railroad track, does not require him to anticipate the possibility of a fall at an ordinary crossing.[46]

Same—Children.

(2685) The court instructs the jury that, while the child, ———, was required to use only such care and caution as could be reasonably expected of a child of his years and experience, nevertheless, he was required to use such care and caution; and if the jury believe from the evidence that he did not do so, and was himself negligent in running right in front of and close to the car; and his being run upon by the car was the result of his negligence in not exercising such care; then the jury will find their verdict for the defendant.[47]

(2686) The court instructs the jury that the degree or measure of care or caution which said infant child, ———,

[44] Approved in Traver v. Spokane St. Ry. Co., 25 Wash. 225.
[45] Pyne v. Broadway & S. A. R. Co., 46 N. Y. St. Rep. 662.
[46] Mentz v. Second Ave. R. Co., 3 Abb. Ct. App. Dec. 274.
[47] Hogan v. Citizens' Ry. Co., 150 Mo. 36.

was required to exercise, was that which is ordinarily exercised, and which is reasonably to be expected from a child of his years and experience, under the circumstances he was in, as shown by the evidence; and before the jury can find him guilty of contributory negligence, they must find that he failed to exercise such care or caution as might reasonably be expected of a child of his years and experience under the circumstances; and the burden of proving contributory negligence is on the defendant, to be established by a preponderance of the evidence.[48]

(2687) The court instructs the jury that it was the duty of the said ——— to have exercised such a degree of care and prudence in crossing said tracks, and in looking and listening, as an ordinarily careful and prudent boy of like age and intelligence would have exercised under like circumstances. And if you believe from the evidence that the said ——— failed to exercise such a degree of care and prudence in going on or crossing the tracks, then you should find that he was guilty of negligence.[49]

(2688) The court instructs the jury upon the issue as to whether the deceased was guilty of negligence contributing to her death, such as will prevent the plaintiffs from recovering in this case, that the law requires all persons situated as the deceased, ——— was, when and before the accident happened, to exercise ordinary care and caution to avoid injury to themselves; and that the absence of such care and caution constitutes negligence. In determining, however, whether the deceased, ———, was exercising such care and caution, the jury should take into consideration her age and capacity, since the law requires of a child nine years old only such care and caution as might reasonably be expected of one of her age and capacity under similar circumstances. If, there-

[48] Hogan v. Citizens' Ry. Co., 150 Mo. 36.

[49] Approved in Ruschenberg v. Southern Electric R. Co., 161 Mo. 70.

fore, you find that the deceased, ———, in going upon the defendant's track, was using that degree of care which, in the ordinary experience of mankind, was to be expected of one of her age and capacity under similar circumstances, then she was not guilty of negligence within the meaning of the law and these instructions. The court further instructs you that the burden of proving that the deceased, ———, was guilty of negligence contributing to her death, is upon the defendant.[50]

Same—Acts under excitement.

(2689) The court instructs the jury that, if you should believe that the plaintiff might have avoided the accident by driving directly across the track instead of undertaking to turn, he would not necessarily be guilty of contributory negligence in that respect, provided you find that an ordinarily careful and prudent man, under the excitement and particular circumstances surrounding the plaintiff at the time, might have adopted the course pursued by him. His conduct in that regard is not necessarily to be judged by the facts as they now appear before the jury, as the same are subjected to the cool, calm consideration that you will be able to give them in the light of all the facts and circumstances as they are now made to appear, but he is entitled to have them considered as they appeared to him at the time; and, as I said, if an ordinarily careful and prudent man might have acted as the plaintiff acted, with his view of the circumstances as they then appeared to him, you will be justified in finding that he was not guilty of contributory negligence by turning back, rather than by going directly across the track.[51]

Same—Intoxicated person.

(2690) The court instructs the jury that, if you believe

[50] Approved in Schmidt v. St. Louis R. Co., 22 Am. & Eng. Ry. Cas. (N. S.) 711.

[51] Approved in Traver v. Spokane St. Ry. Co., 25 Wash. 225.

that deceased was intoxicated at the time of the accident, and that his intoxication was so great that it rendered him incapable of a vigilant use of his faculties and senses while approaching defendant's tracks, the jury may infer that deceased was guilty of negligence without which the accident would not have happened, and they will find for the defendant.[52]

Same—Violation of laws by company as excuse for want of care by injured person.

(2691) The court instructs the jury that, if you shall find that the defendant was operating its car at a high rate of speed; yet, if you shall further find that the plaintiff by his negligence and want of ordinary care contributed to the accident in any appreciable degree; your finding must be for the defendant.[53]

(2692) The court instructs the jury that it was the duty of the plaintiff to exercise ordinary care upon his part, to make use of his faculties, upon approaching the crossing of defendant's track; that, whether the servants operating defendant's car by electricity gave signals or not, it was the duty of plaintiff to look and listen before driving on defendant's track; and if from the evidence the jury believe that plaintiff failed to exercise ordinary care, and failed to look and listen, and thereby directly contributed to the wagon and defendant's car coming into contact and causing the injuries to plaintiff; then their verdict should be for the defendant company.[54]

Same—Injuries avoidable notwithstanding contributory negligence.

(2693) The court instructs the jury that, if the plaintiff was guilty of the want of reasonable and ordinary care in at-

[52] Bradley v. Second Ave. R. Co., 8 Daly, 289.

[53] Approved in Traver v. Spokane St. Ry. Co., 25 Wash. 225.

[54] Approved in Guinney v. Southern Electric Ry. Co., 25 Am. & Eng. Ry. Cas. (N. S.) 820.

tempting to cross the tracks of the defendant under the circumstances testified to, then he is not entitled to recover, unless they believe from the evidence that the motorman could have avoided the accident by the use of ordinary care after he saw, or by the use of ordinary care might have seen, that the plaintiff was on the track and was in danger of being struck by the car.[55]

(2694) The court charges that the rule of law is that the plaintiff must show, not only that the defendant was negligent, but that he himself was free from negligence. If you believe the plaintiff's statement, in my judgment he has so shown; and if you believe the plaintiff, that at the time he started to turn his horse's head to cross the track the defendant's car was at a dead stand-still at —— street, and that while said car was so standing, plaintiff's horse was crossing the track, he was doing what he had a right to do; if the gripman of defendant's car saw him and attempted to get through while the plaintiff was in the position stated, the gripman had no right to do so. The plaintiff has attempted to show that this car was stopped at the crosswalk when he started to get across the track; and if this is so, and he was doing that which he had a right to do, the defendant had no right to proceed and collide with the plaintiff; the gripman should have waited until the plaintiff's horse and rockaway got out of the way before proceeding on his journey with the car. [56]

(2695) The court instructs the jury that, if you believe plaintiff was negligent in going upon the defendant's track at the time and place and manner indicated by the evidence; still, if you find that the accident might have been prevented by the use of ordinary care upon the part of defendant's employees in charge of the car, after they discovered the

[55] Approved in Baltimore Traction Co. v. Appel, 12 Am. Neg. Cas. 17.

[56] Riegelman v. Third Ave. R. Co., 59 State Rep. 667.

plaintiff upon the track; and if you find that they did not exercise such care, but, knowing the plaintiff's danger, if he was in danger, willfully allowed said car to run unimpeded up to the time when a collision was inevitable; then your verdict should be for the plaintiff.[57]

(2696) The court instructs the jury that, if the plaintiff were guilty of negligence in going upon the track; and yet the motorman in charge of the car, with proper appliances, and in the exercise of ordinary care could have avoided the injury; the negligence of the plaintiff would not constitute any defense on the part of the defendant.[58]

(2697) The court instructs the jury that if as claimed by the plaintiff, the wheels of the wagon were dangerously near the track, and the motorman of the approaching car either did see it, or if by the use of proper care and diligence he could have seen it in time to have stopped this car and did not do so, the plaintiff would be entitled to recover. The law requires that a person shall exercise all due care and diligence to prevent accidents. If he did see it and ran into it; or if he, using proper care, could have seen it and did not, and ran into it through carelessness or recklessness; the plaintiff is entitled to recover.[59]

II. As Carrier.

Degree of care required.

(2698) The court instructs the jury that defendant company is a carrier of passengers, operating its cars by means of electricity, and is bound to use extraordinary care, and is liable for slight negligence.[1]

(2699) The court instructs the jury that the degree of care which defendant and its employees were bound to exer-

[57] Approved in Traver v. Spokane St. Ry. Co., 25 Wash. 225.

[58] Approved in Schneider v. Market St. Ry. Co., 23 Am. & Eng. Ry. Cas. (N. S.) 692.

[59] Higgins v. Wilmington City Ry. Co., 1 Marvel (Del.) 352.

[1] Approved in Denver Tramway Co. v. Reid, 4 Colo. App. 53.

cise towards plaintiff (if you find from the evidence he paid his fare as a passenger at any time during his said trip on the car, as he alleges) was this: Defendant was bound to run and operate its cars with the highest degree of care of a very prudent person, in view of all the facts and circumstances at the time of the alleged injury.[2]

Liability toward person not a passenger.

(2700) The court instructs the jury that, if it appear that H. was not a passenger at the time of injury, the defendant is only bound to the use of ordinary care, and is responsible only for gross negligence. Ordinary care is that degree of care which a prudent man would exercise about his own affairs.[3]

(2701) The court instructs the jury that, if it appear that H. was not a passenger, and that he did not in any manner by his own negligence contribute to the injury; still, the plaintiff cannot recover, unless it appear that the injury and death were caused by the gross negligence of defendant or its agents.[4]

Persons who are passengers.

(2702) The court instructs the jury that when a car stops on the street to receive passengers, it invites persons to enter the car and became passengers, and until that invitation is recalled, any person actually taking hold of the car and beginning to enter it, is a passenger.[5]

(2703) The court instructs the jury that, if they believe from the evidence that the plaintiff hailed the street car mentioned in the evidence for the purpose of embarking thereon as a passenger; and that the said car was in consequence

[2] Approved in O'Connell v. St. Louis Cable & Western R. R. Co., 106 Mo. 482.

[3] Approved in Huelsenkamp v. Citizens' Ry. Co., 37 Mo. 537.

[4] Approved in Huelsenkamp v. Citizens' Ry. Co., 37 Mo. 537.

[5] Davey v. Greenfield & Turner's Falls Street Ry. Co., 177 Mass. 106.

thereof arrested as if it was going to stop, or stopped, by a servant or servants of the defendant company; and that the plaintiff endeavored to get upon said car; then the plaintiff in so endeavoring to get on said car was a passenger under the care of the defendant company; and if the jury further believe from the evidence that the plaintiff was injured by the negligent starting of the car while he was in the act of getting thereon, in the exercise of such care as might reasonably be expected from a man of his age under the circumstances; then they should find for the plaintiff. But if the jury believe from the evidence that the car slowed up in consequence of nearing a curve and down grade, and not in response to any signal from the plaintiff, then the plaintiff was not a passenger.[6]

(2704) The court instructs the jury that the simple fact that H. was on board defendant's car, will not authorize the jury to infer or conclude that he was a passenger for hire. But if they are satisfied from the evidence that persons, without the previous consent of agents or servants of the defendant, were in the habit of getting on its cars and riding thereon both outside and inside upon the platform and steps, and that too without reference to the number of persons so getting on and riding; and that defendant habitually collected the fare for carriage of such persons; and further that H. got upon defendant's car for the purpose of being carried as a passenger; then, in the absence of any prohibition against his becoming a passenger, the jury is justified in inferring there was a contract between defendant and him that the defendant would carry him as a passenger for the fare; and it is the right and duty of the jury to determine from all the evidence in the case whether there was any such contract between the defendant and H.; in other words, to determine whether he was a passenger for hire on this car or not.[7]

[6] Reynolds v. Richmond & Manchester Ry. Co., 92 Va. 400.

[7] Huelsenkamp v. Citizens' Ry. Co., 37 Mo. 537.

(2705) The court instructs the jury that, if plaintiff paid his fare, he became a passenger upon the car without regard as to whether he paid his fare with a nickel or with pennies or in any other way; but that it is for the jury to determine from all the evidence bearing on the question as to whether plaintiff paid his fare or not.[8]

Rights of person before payment of fare.

(2706) The court instructs the jury that, although when the occurrence in question happened the plaintiff had not paid his fare, and by reason of said event got off without paying; yet, if the jury believe from the evidence that he went on the car as a passenger with the intention of paying his fare when called upon; then he was a passenger, and the defendant owed to him the same duties as if, in fact, he had paid his fare.[9]

Reasonableness of carrier's rules.

(2707) The court instructs the jury that defendant had the right to make reasonable rules and regulations regulating the manner and place passengers should ride on its cars, and a rule forbidding passengers to ride on the front platforms of its cars is a reasonable rule and regulation.[10]

Reasonableness of rule providing that car may start without signal from conductor.

(2708) The court instructs the jury that, if it was necessary to avoid collisions between defendant's cars and those on the ——— Line, then the defendant had the right to adopt the regulation that the cars of the defendant, when stopped before reaching ———, should go forward on the signal of the watchman to the gripman, without any bell from the conductor; provided that you believe, in carrying out this regulation, the defendant gave such notice as was reasonably

[8] Reem v. St. Paul City Ry. Co., 82 Minn. 98.
[9] Approved in Dougherty v. Missouri R. R. Co., 97 Mo. 647.
[10] Sweetland v. Lynn & Boston R. Co., 177 Mass. 574.

possible under the circumstances to the passengers that they should only alight on the further crossing.[11]

Injury to passenger by passing car.

(2709) The court instructs the jury that, if they find the agents of defendant were guilty of negligence in the management of the cars of defendant by reason of which two of defendant's cars came in collision with each other, or came so near each other on the road at a place provided for the cars on the road to pass each other by reason of which deceased was injured and killed; and that deceased was then a passenger on defendant's road; and that deceased was not guilty of any want of ordinary care and prudence which directly contributed to the injury; then the defendant is liable in this suit.[12]

(2710) The court instructs the jury that, if they find that deceased was at the time of his death the husband of plaintiff; and that defendant was a corporation and a common carrier; and that deceased was a passenger for hire in a car of defendant; and that deceased was carried as a passenger upon the steps of a car of defendant by its agents, and because there was no room elsewhere for him in and about the car; and if, while the car upon which deceased was being carried was passing another car of defendant upon a turnout in the road, the two cars came in collision with each other or approached each other so near as to kill deceased by jamming or crushing him between the said cars; and such catastrophe was caused by the least negligence, want of skill or prudence on the part of defendant's agents in managing said car or either of them; and that deceased then and there exercised ordinary care and prudence as a passenger; then the jury should find for plaintiff [and assess damages at $5,000]. Under the circumstances above stated though the jury may

[11] Approved in Jackson v. Grand Ave. Ry. Co., 118 Mo. 199.

[12] Approved in Huelsenkamp v. Citizens' Ry. Co., 37 Mo. 537.

believe that, if deceased had used extraordinary care, and had been on the alert, and had been looking out ahead for danger he might have avoided injury; yet, his failure so to do furnishes no excuse for defendant, and its liability is not affected thereby.[13]

Injury received from collision with wagon near track.

(2711) The court instructs the jury that, if they shall find from the evidence that the plaintiff was a passenger on defendant's railroad; and that while riding as a passenger upon defendant's train, plaintiff was injured by reason of a collision between the train on which plaintiff was riding and a wagon driven by ———; and if the jury believe from the evidence that the collision was brought about through the concurrent negligence of the driver of said wagon and of the servants of the defendant; and that plaintiff was at the time of the injury exercising ordinary care for his own safety; then the defendant may be held liable for injuries which plaintiff sustained through the collision of the train and the wagon.[14]

Liability to passenger injured by broken trolley wire.

(2712) The court instructs the jury that, if they find from the evidence that the plaintiff, while a passenger on one of the defendant's cars and while exercising ordinary care, was shocked and knocked off such car and injured by coming in contact with the end of a broken trolley wire used by defendant in the operation of their railway; then their verdict must be for the plaintiff, unless they shall further find that by the exercise of that high degree of care required by reason of the well known dangerousness of the agency employed, defendant could not have prevented the injury complained of.[15]

[13] Approved in Huelsenkamp v. Citizens' Ry. Co., 37 Mo. 537.

[14] West Chicago St. R. Co. v. Horne, 100 Ill. App. 259.

[15] Approved in Baltimore City Pass. Ry. Co. v. Nugent, 86 Md. 349.

(2713) The court instructs the jury that, if they find from the evidence that the accident complained of by the plaintiff was caused solely by hidden or latent defect—not apparent to the eye—in the trolley wire of the defendant, and that the defendant could not have discovered or detected it by any reasonable examination by the defendant or its agents; and the jury further find that the defendant company employed such proper and suitable contractors to erect the trolley wire and over-head construction at the place of the accident; and that such contractors used suitable material and a proper and skillful method of over-head construction; then defendant has performed its duty to the passenger in this regard, and the verdict must be for the defendant, even though the jury further find that the plaintiff, without fault on his part, did receive injuries by reason of the breaking and falling of said trolley wire.[16]

Use of fractious horses.

(2714) The court instructs the jury that, if they believe from the evidence that the plaintiff was at the time of the event in question a passenger on one of defendant's cars, then the defendant owed to the plaintiff the duty of exercising the utmost care and vigilance to carry him over its road safely; and is responsible to the plaintiff for any neglect or want of proper care which the jury may find from the evidence—if they so find—causing the injury in question arising from the management of the car and horses by the defendant's servants or employees, or from the use of skittish or unsuitable horses causing the injury in question.[17]

Protection of passenger en route to seat.

(2715) The court instructs the jury that, if they believe from the evidence that the plaintiff at the time of the injury in question went upon the defendant's car as a passenger, and there was a vacant seat; then and in that case it was the

[16] Approved in Baltimore City Pass. Ry. Co. v. Nugent, 86 Md. 349.
[17] Approved in Dougherty v. Missouri R. R. Co., 97 Mo. 647.

bounden duty of defendant, its servants and employees either to not start the car until he had time to get a seat, or if it started it before, to use the utmost care to start it smoothly and in such a manner as not to throw him off his feet. And if the jury believe from the evidence that the car was started before the plaintiff had reasonable time to take his seat, and with a sudden and violent jerk which might have been avoided, causing said injury, the jury will find for the plaintiff, unless it appears from the evidence that said jerk was produced by some cause not under the control of defendant or its agents, servants or employees.[18]

(2716) The court instructs the jury that if you find from the evidence that the plaintiff, on or about ———, got upon the rear platform of one of the cars that was then being operated by defendant as a carrier of passengers; and that thereafter he was thrown from said platform and injured by reason of the omission of such care on the part of the operatives or employees of defendant in operating or moving said car (at the time and place of the injury), [as is particularly defined in instruction ——]; and if you further find from the evidence that by reason of such want of care, the car on which plaintiff was riding at the time was started by defendant's employees rapidly around a certain curve at the junction of ——— and ——— Streets, before plaintiff had a reasonable time to reach a position of reasonable safety on said car; and that plaintiff thereafter paid his fare as a passenger on said car; then your verdict should be for plaintiff.[19]

(2717) The court instructs the jury that, if they believe from the evidence that the plaintiff was at the time of the occurrence in question a passenger on one of the cars of the defendant's street railroad, exercising reasonable care and diligence; and that the car started, before plaintiff took his

[18] Approved in Dougherty v. Missouri R. R. Co., 97 Mo. 647.
[19] O'Connell v. St. Louis C. & W. R. Co., 106 Mo. 482.

seat, with a sudden and violent jerk; that by reason thereof the plaintiff lost his balance, and his hand was thrown against and through one of the windows of the car, cutting and injuring it; then and in that case the defendant is liable to the plaintiff for the damage caused by and resulting from said injury to plaintiff, unless the jury further believe from the evidence that the defendant, its agents, servants and employees managing said car, were not guilty of any negligence or want of care in the management of said car causing the injury; and the burden of showing such care and want of diligence is upon the defendant to prove to the satisfaction of the jury.[20]

Starting before passenger has reached place of safety.

(2718) The court instructs the jury that defendant was not bound to carry plaintiff safely, absolutely and at all events; but was only bound to operate its train of cars under all of the circumstances with the highest degree of care of a very prudent person; and if the jurors are satisfied from all the evidence in the case that defendant's servants, operating the coach from which plaintiff says he was thrown, gave plaintiff reasonable opportunity to get in a place of safety before the car started, then the verdict will be for defendant.[21]

Starting while passenger is alighting.

(2719) The court instructs the jury that, if you believe from all the evidence in this case that the plaintiff became and was a passenger upon a car of defendant, and that her fare was paid to the conductor; and that the plaintiff gave to the conductor on such car reasonable notice of her desire to get off of said car at the corner of ——— and ——— streets, as alleged in her declaration; it then and there became and was defendant's duty to stop said car at said place,

[20] Approved in Dougherty v. Missouri R. R. Co., 97 Mo. 647.

[21] Approved in O'Connell v. St. Louis C. & W. R. Co., 106 Mo. 482.

upon arriving at the same, a sufficient length of time to enable plaintiff to alight therefrom in safety; and if the jury further believe from all the evidence that the defendant thereafter ran its said car to the said corner of ——— and ——— streets, and was then and there in the act of slowing up or stopping said car; and that the plaintiff was then and there exercising all due care and caution for her own safety, and that while so exercising said care and caution she was preparing to alight from said car when it should come to a stop, and that such act or acts by her of preparing to alight at the time under all the circumstances and in the manner shown by the evidence were not negligence or carelessness on her part; and that the defendant then and there did not so stop the said car as that the plaintiff could safely alight therefrom, but suddenly started the said car in such manner that it thereby then and there threw the plaintiff to the ground; and that such starting of the car was negligence on the part of defendant, and that the plaintiff was thereby injured as charged in her declaration; and that plaintiff was during all the time in the exercise of due care and caution for her own safety; then the defendant would be liable to the plaintiff for such injury, and in such case you will find for the plaintiff.[22]

(2720) The court instructs the jury that it was the duty of the defendant, as a common carrier of passengers in ———, for hire, when it stopped its car, whether in consequence of cars being on ——— Street or from any other reason, not to start the same again while the plaintiff was in the act of getting off the car, if the fact that plaintiff was in the act of alighting was known to the conductor having charge of the same; and as a common carrier of passengers, it was defendant's duty to give plaintiff a reasonable opportunity to alight from its car before starting the same;

[22] Approved in Springfield Consolidated Ry. Co. v. Hoeffner, 175 Ill. 634.

if the fact that plaintiff desired to alight was known to the conductor in charge of the car; and if the jury believe from the evidence that on the ——, 19—, the plaintiff was a passenger upon one of the street cars of the defendant operated by it on ——— Street in the city of ———; and while such car of defendant, in which plaintiff and others were being conveyed as passengers, was passing along ——— Street, south of ———, it had stopped for any purpose, and when so stopped the plaintiff was in the act of getting off said car with the knowledge of the conductor of said car; and while in the exercise of due diligence on her part, and that said car was started while plaintiff was so getting off, and before she had a reasonable time to do so, she was thereby thrown down upon the street and was injured; the defendant is liable for the damages thereby sustained by plaintiff, and the verdict should be for the plaintiff.[23]

Duty of conductor before giving starting signal.

(2721) The court instructs the jury that the conductor is not bound as a matter of law on all occasions and on every occasion to know that no person is seeking to enter the car when he gives the signal to start; but when nothing more is shown than the fact that the car has stopped to receive passengers and that persons are seeking to enter, it is his duty to know whether any are entering at the time he gives the signal for starting.[24]

Necessity of conductor's knowledge that passenger is alighting.

(2722) The court instructs the jury that, even if they believe from the evidence that the car from which plaintiff was alighting had come to a full stop and was then started up; it is not enough for them to believe from the evidence that the conductor might have known plaintiff was alighting,

[23] Jackson v. Grand Ave. Ry. Co., 118 Mo. 199.

[24] Davey v. Greenfield & Turner's Falls St. Ry. Co., 177 Mass. 106.

but it is necessary for them to find from the evidence that the conductor had actual knowledge of that fact.[25]

Right of motorman to start on signal from person other than conductor.

(2723) Although you may believe from the evidence that it was necessary to have a flagman at N. and W. Streets, and that a flagman was so kept to notify or signal for cars to cross or to stop; still, if you find from the evidence that the car stopped south of N. Street, and while it was so stopped plaintiff started to alight from said car, and the conductor saw her attempting to alight while said car was stopped; it was his duty to cause said car to remain standing until plaintiff had a reasonable time to alight, notwithstanding the flagman may have signaled for the car to cross.[26]

(2724) If the jury believe from the evidence that some person not in the employment of the defendant company rang the bell which started the train at the time in question; still, that fact will not exempt the defendant company from liability in this case, provided the jury believe from the evidence that the conductor could by use of due care and diligence have countermanded the unauthorized signal for starting the train in time to have prevented any injury to plaintiff, if he (the conductor) had exercised due care and diligence in the discharge of his duties; and providing the jury believe from the evidence that plaintiff at the time in question was in the exercise of reasonable care and diligence for his own safety.[27]

Contributory negligence generally.

(2725) The court instructs the jury that, in determining what would be ordinary care in a particular case, reference must be had to all the circumstances and surroundings of

[25] Approved in Jackson v. Grand Ave. Ry. Co., 118 Mo. 199.
[26] Jackson v. Grand Ave. Ry. Co., 118 Mo. 199.
[27] Approved in North Chicago St. R. Co. v. Cook, 145 Ill. 551.

that case; and if, all the circumstances and surroundings considered, the plaintiff in this case used ordinary care in preparing to get off defendant's car and alighting therefrom, then he is not guilty of contributory negligence in producing the injury complained of, and for which this suit is brought.[28]

(2726) The court further instructs the jury that, although they may believe that the negligence or want of care of the agents and servants of the defendant contributed to the happening of the injury to plaintiff; yet, if they believe from the evidence that the plaintiff was likewise guilty of negligence or want of care which directly contributed to produce said injury, the verdict must be for the defendant.[29]

Duty to exercise ordinary care where passenger is guilty of contributory negligence.

(2727) The court instructs the jury that, if the injury complained of was done to the plaintiff by the electricity used by the defendant for motive power or in any other wise, or by any other means, or on account of the failure of the defendant to use extraordinary care about the operation of its said road and cars; then the defendant company is liable in this suit, unless the plaintiff had failed to use ordinary care and prudence in preparing to leave said car and alighting therefrom; and, even if he failed to use such ordinary care and prudence, the defendant company is still liable, if this failure to use ordinary care and prudence on the part of the plaintiff was the remote, and the negligence of the defendant company was the immediate, cause of the said injury.[30]

Doctrine of comparative negligence.

(2728) The court instructs the jury that, if they find that the negligence, if there was negligence, on the part of the plaintiff was slight, or was the remote cause of the injury,

[28] Approved in Denver Tramway Co. v. Reid, 4 Colo. App. 53.
[29] Approved in Dougherty v. Missouri R. R. Co., 97 Mo. 647.
[30] Approved in Denver Tramway Co. v. Reid, 4 Colo. App. 53.

then plaintiff may recover, notwithstanding such slight negligence or remote cause; and though the plaintiff may have been guilty of misconduct or failure to exercise ordinary care and prudence which may have contributed to the injury, yet if the agents of the defendant company were guilty of mismanagement or negligence in the management of said car which was the immediate cause of the injury to the plaintiff, and with the exercise of ordinary care by such plaintiff, said injury might have been prevented; then defendant is liable in this suit.[31]

Right of passenger to adopt ordinary measures for his safety.

(2729) The court instructs the jury that, in arriving at a conclusion as to whether the plaintiff was guilty of contributory negligence at the time of the happening of the accident, they may take into consideration the natural instinct of self-preservation and the care that any person under ordinary conditions will take of himself from regard for his own life.[32]

Doctrine of remote and proximate cause.

(2730) The court instructs the jury that, although the deceased may have been guilty of misconduct or failed to exercise ordinary care and prudence while a passenger on defendant's car, which may have contributed remotely to the injury or death of deceased; yet, if the agents of defendant were guilty of misconduct in the management of said cars, which was the immediate cause of deceased's injury and death; and with the exercise of prudence by said agents, said injury and death might have been prevented; the defendant is liable in this suit.[33]

Duty of passenger to hold to strap.

(2731) The court instructs the jury that, although they

[31] Approved in Denver Tramway Co. v. Reid, 4 Colo. App. 53.
[32] Approved in Denver Tramway Co. v. Reid, 4 Colo. App. 53.
[33] Approved in Huelsenkamp v. Citizens' Ry. Co., 37 Mo. 537.

may believe from the evidence that if the plaintiff had on entering the car taken hold of a strap, or taken a seat nearer the door than the one he attempted to take, the accident would not have happened; yet, if the jury further believe from the evidence that he acted with reasonable and ordinary care in not taking hold of a strap or in moving further forward, and as a prudent man under similar circumstances would ordinarily act; then he was using all the care and diligence imposed by law upon him.[34]

(2732) The court instructs the jury that, even though they believe the defendant company was to blame in starting the car in which plaintiff was standing with a violent and unusual jerk, and before plaintiff had an opportunity of taking his seat; yet, if the jury also find that plaintiff was informed by the conductor's striking the bell, or in any other way knew or had reason to expect the car was about to start; then it was the duty of the plaintiff to have protected himself by the most prudent means within his reach against the starting of the car. And if you find that straps were provided in said car for the use or convenience of passengers, by which the plaintiff, after the warning of the conductor's bell, might have supported himself while the car was being started; and that he failed so to do, and by reason of such failure he was injured; then you will find the issues for the defendant.[35]

Arising from seat and preparing to alight before car has stopped.

(2733) The court instructs the jury that, if they find from the evidence that plaintiff got up from his seat and prepared to get off the car before the car had fully come to a stand-still, but was very slightly moving, such act was not contributory negligence on the part of plaintiff unless such getting up from his seat and otherwise preparing to get off

[34] Approved in Dougherty v. Missouri R. R. Co., 97 Mo. 647.
[35] Approved in Dougherty v. Missouri R. R. Co., 97 Mo. 647.

the car and alighting therefrom, was done in a careless or negligent manner, all the circumstances and surroundings considered.[36]

Alighting from car in motion.

(2734) The court instructs the jury that if the plaintiff undertook to alight from the defendant's car while it was moving, then defendant could not have been guilty of any negligence as charged, and your verdict must be for defendant.[37]

Getting off car in motion to escape assault.

(2735) The court instructs the jury that, if the plaintiff on the evening of —— was carried by the car into the barn and there assaulted, as testified to by her; and that on account of that treatment, on the evening of ——, seeing the car leaving the main track and again turning to go into the barn, and she had reasonable cause to fear danger to herself, or a repetition of such treatment; and controlled by such fear, to save herself, she attempted to get off the car while in motion, using such reasonable care and caution as she was able to use under the circumstances, and was then injured; the defendant is liable for the injury. If plaintiff used that reasonable caution at this time and place, as testified to by her; and she used that reasonable caution which a prudent person would use under the circumstances, fearing a repetition of the assault that was committed on ——; then, that will remove the bar which otherwise would rise on account of what would be contributory negligence; she had a right to do it and it was her duty to do it, if those things were so. If the defendant by this wrongful act puts the plaintiff in a position where she had reasonable cause to apprehend danger to herself, she had the right to take such steps to save herself from said danger as in her judgment,

[36] Denver Tramway Co. v. Reid, 4 Colo. App. 53.

[37] Approved in Jackson v. Grand Ave. Ry. Co., 118 Mo. 199.

formed from the exigency of the moment, was best; and if injured, defendant was responsible for the injury.[38]

Alighting from car in motion—Consideration of rate of speed.

(2736) The court instructs the jury that, if the plaintiff alighted from said car while same was in motion and going at such rate of speed that a person of ordinary care and prudence would not have alighted under the circumstances, then she was guilty of contributory negligence, and cannot recover in this cause, whether the defendant was negligent or not; and if you find from the evidence that she did so alight, then your verdict will be for the defendant.[39]

Alighting from and entering car which has stopped on wrong side of the street.

(2737) The court instructs the jury that, although you may believe the plaintiff got off from the car at the north side of ——— street, when the usual place for alighting was on the south side of ——— street, that fact alone would not justify you in finding her guilty of such negligence as would bar a recovery in the case, unless you believe and find that it was the proximate cause of the injury.[40]

(2738) The court instructs the jury that, though they may believe from the evidence that the plaintiff informed the conductor that she wanted to get off at —— Street, and although the car stopped before reaching —— Street; yet, if the jury believe that such stop was not made for passengers to alight, but for the gripman to await the signal from the watchman to cross —— Street; and if the plaintiff was told not to get off at that place, but she did get off and in so doing was thrown down and injured; then she cannot recover in this action, and your verdict will be for the defendant.[41]

[38] Approved in Ashton v. Detroit City R. Co., 78 Mich. 587.
[39] Approved in Jackson v. Grand Ave. Ry. Co., 118 Mo. 199.
[40] Approved in North Chicago St. R. Co. v. Eldridge, 151 Ill. 542.
[41] Approved in Jackson v. Grand Ave. Ry. Co., 118 Mo. 199.

Attempting to board moving car.

(2739) The court instructs the jury that, if you believe from the evidence that the plaintiff came to the * * * car from the rear, and was not upon the car, but was in a position where the conductor in the exercise of ordinary care in looking for intending passengers at the rear step of his car would not ordinarily see plaintiff; and the conductor, in the exercise of ordinary care in looking for intending passengers at the rear step, did look there; and in so looking saw no intending passenger, and at once gave the signal to go ahead, and the car thereupon started; then there could be no recovery in this case, and your verdict will be for defendant.[42]

(2740) The court instructs the jury that, if they believe from the evidence that ———, plaintiff, was an old man, and attempted to board the defendant's car without invitation from the defendant or its agents, while it was in motion, very much crowded both inside and on the platform; and while he was encumbered with a cane and umbrella; and that after getting a footing on the car he let go his hold on the railing to catch at his hat, and fell; he was guilty of contributory negligence, and they must find for the defendant, unless they believe from the evidence that the defendant could have prevented the accident by due care on its part.[43]

Riding in dangerous and improper place.

(2741) The court instructs the jury that, if ——— voluntarily took and placed himself in a dangerous and improper position on the car, when he might have taken a more safe place or position, and his death was caused by reason of his having placed himself in such a dangerous position, then the plaintiff cannot recover.[44]

[42] Gaffney v. St. Paul City Ry. Co., 81 Minn. 459.

[43] Reynolds v. Richmond & M. Ry. Co., 92 Va. 400.

[44] Approved in Huelsenkamp v. Citizens' Ry. Co., 37 Mo. 537.

Passenger surrendering seat to lady and standing on platform.

(2742) The court instructs the jury that, if they find from the evidence in the cause that the plaintiff was a passenger on one of defendant's cars, and was occupying a seat inside in a safe place; and they further find that said car was crowded with passengers and all the seats were taken, and that the plaintiff arose and vacated his seat to accommodate some lady passengers who had entered the car; and that on account of the crowded condition of said car, instead of standing therein, he voluntarily left it and passed out upon the platform and remained standing on the outside where the accident occurred; then the question as to whether or not in so conducting himself he was guilty of negligence is one of fact which the court submits to the jury. If his conduct in this respect in doing what he did under the circumstances, was the conduct of an ordinarily prudent and cautious man, then he was not guilty of negligence. If, on the other hand, in going out upon the platform,—under the circumstances he did that which a prudent and cautious person would not and ought not to do, then he would be guilty of negligence.[45]

Riding on platform contrary to rule.

(2743) The court instructs the jury that, if they find from the evidence that plaintiff knew that there was a rule forbidding passengers riding on the front platform, and that if at any time after boarding the car there was room inside the car where he could have stood or sat; and the plaintiff knew there was room inside the car and the plaintiff refused or neglected to avail himself of the opportunity to go inside, but continued to ride on the front platform in violation of such rule; he cannot recover, unless he was justified in assuming from the manner in which the railroad was operated that the enforcement of the rule had been waived.[46]

[45] Approved in Terre Haute Electric Ry. Co. v. Lauer, 21 Ind. App. 466.

[46] Sweetland v. Lynn & Boston R. Co., 177 Mass. 574.

Duty of passenger to take notice of rules as to stops.

(2744) The court instructs the jury that, if they believe from the evidence that it was reasonably prudent, for the safety of the traveling public, that the defendant should stop or slow down its cars before reaching —— Street and await the signal of the watchman, then it became the duty of the defendant to make such stop or slow down; and passengers riding on defendant's cars must take the responsibility of informing themselves of the methods so to be observed in operating defendant's road at that point; and plaintiff had no right to undertake to alight at that point, and if she did so, it was at her own risk and she cannot recover, unless the jury shall further find from the evidence that the car had come to a full stop, and that said car was started up again while plaintiff was alighting therefrom, with actual knowledge of the conductor that she was so alighting at the time.[47]

Instructions of persons in charge of the car as preventing liability for contributory negligence.

(2745) The court instructs the jury that it is the duty of a passenger on a car to follow the reasonable instructions of those in charge of the car, in regard to moving from one part of the car to another, unless it is apparent to the passenger that the movement would be attended with danger; and a passenger may rightfully assume that the servants in charge of the car are familiar with the operations of the car, and that they have a reasonable knowledge of what is safe and prudent for the passengers in giving such instructions. Therefore, if you find from the evidence that one of the servants of the defendant directed the plaintiff to move to that part of the car where the accident occurred, it was the duty of the plaintiff so to do, unless it was known and apparent to her that it would be unsafe for her to do so; and, in the absence of apparent danger, she had a right to assume

[47] Approved in Jackson v. Grand Ave. Ry. Co., 118 Mo. 199.

that it was safe for her to move to and stand at the place where the defendant's servants directed her to move to in the car; and if you find that it was an unsafe place for the plaintiff to stand, and that without her fault she was injured by reason of her moving to and standing at such place; then your finding should be for the plaintiff.[48]

Protection of passenger from trains on parallel tracks.

(2746) The court instructs the jury that, if they believe from the evidence that it was the direct and usual way, in getting on or off defendant's trains on the south track to or from the junction sidewalk on the north, for passengers to cross over defendant's north track; and that defendant invited and allowed passengers to so cross over its north track, in getting on or off its trains on the south track at said junction to or from the sidewalk on the north; then they are instructed that the plaintiff's right as a passenger entitled him to the same degree of extraordinary care and vigilance for his safety, on the part of the defendant, while he was passing from his train over defendant's north track to the junction sidewalk on the north as while being transported as a passenger over defendant's line.[49]

CHAPTER CXV.

SUBSCRIPTION.

Liability on subscription to aid in construction of railroad, 2747.
Who may enforce subscription, 2748.

Liability on subscription to aid in construction of railroad.

(2747) The court instructs the jury that the true construction of the written subscription alleged in the declaration sued on in this case is, that the defendant agrees to pay

[48] Prothero v. Citizens' St. Ry. Co., 134 Ind. 431.

[49] Approved in Burbridge v. Kansas City Cable R. Co., 36 Mo. App. 669.

to the plaintiffs for the benefit of the builders of the railroad in question the sum of —, to be given over to said builders of the road when said road should be completed, and in operation from ——— to ———, provided it should be so completed and in operation by ——; and the jury are instructed that it is not enough for the plaintiffs to show that the railroad was completed to ——— by ——, but they must show by a preponderance of the proof that the railroad was operated to that place by that time.[1]

Who may enforce subscription.

(2748) The court instructs the jury that, if they believe from the evidence that the defendants (promised to the plaintiffs to pay the several amounts set opposite their names in the instrument set up in the declaration, for the purpose of securing the location of ——— at ——— as alleged in the declaration; and if the jury believe from the evidence that on the faith of said promise by the defendants the ——— association expended money and performed services; then it is immaterial whether the plaintiffs themselves performed any work or expended money on the faith of the defendants' promise; and the jury are instructed that the plaintiffs may recover on behalf of the said association to the extent of the money expended, and the services performed by the said association).[2]

CHAPTER CXVI.

SURFACE WATER.

Diversion of flow by railroad company, 2749-2752.
Same—Burden of proof, 2753.
Improper construction of drains and vaults, 2754.

Diversion of flow by railroad company.

(2749) The court instructs the jury that the first ques-

[1] Ogden v. Kirby, 79 Ill. 555.
[2] People v. Miner, Auditor, 46 Ill. 377.

tion then for you to determine is this: Did the water which flowed down the side of this hill in time of rainfall, and the thawing of snow, flow down through a natural and well-defined channel, or did it not? If it did, the defendant had no right to change the flow of that water so as to produce injury to the plaintiff. If it did not flow down through a natural well-defined channel, but discharged itself generally upon the right of way of the defendant; then the defendant could provide for its discharge from that right of way in such a manner as it saw fit.[1]

(2750) The court tells the jury that any interference with the drainage of the plaintiff's lands, or the flow of surface water which could not be prevented by the proper and skilful construction of defendant company's road with proper and skilfully constructed culverts, was proper to be taken into consideration by the plaintiff, when the defendant company purchased its right of way from the plaintiff; and if the jury believe from the evidence that the railroad through plaintiff's land was properly and skilfully constructed, with properly and skilfully constructed culverts, in proper numbers, and that the same have been kept in proper order; then they cannot assess any damages against the said defendant company on account of ponds or of accumulations of water, though caused by the building and construction of said road.[2]

(2751) The court instructs the jury that the defendant had the right to build its roadbed where it did, and if necessary to its proper construction and use, to throw up the embankment shown to have been made; but in so doing, it was required by law to construct all the necessary culverts and sluices required by the natural lay of the land to prevent surface water from being diverted from its natural and usual

[1] Approved in Fossum v. Chicago, M. & St. P. R. Co., 80 Minn. 9.

[2] Norfolk & W. R. Co. v. Carter, 91 Va. 587.

This was an action on the case.

course, and thrown upon land where it would not otherwise have gone.[3]

(2752) The court instructs the jury that, if you find from the evidence that defendant railway company in constructing its roadbed threw up an embankment near the land of plaintiff (described in the declaration), and put one or more culverts under said embankment; and that during ordinary rains at any time between the —— day of —— 19— and the —— day of —— 19—, such embankments and culverts diverted the surface water from its natural and usual course, and caused it to flow over and upon plaintiff's said land, thereby permanently injuring plaintiff's land; then you will find for plaintiff the amount of such injury.[4]

Same—Burden of proof.

(2753) The court instructs the jury that the burden of proof rests upon the plaintiff to establish the facts necessary to entitle him to recover to the satisfaction of the jury; and the issues submitted to you are to be decided according to the preponderance of the testimony.[5]

Improper construction of drains and vaults.

(2754) The court instructs the jury that, if from the evidence the jury shall find that the plaintiff owned the premises mentioned in the evidence, and that defendant closed the gutters and constructed the drains and vaults mentioned in the first prayer; and after constructing the same failed to keep the same open, clear and watertight, and allowed the outlet from such vault to become closed up, or so closed by matter flowing into the same as to cause the water upon occasions of ordinary rains as might be easily expected to occur in that locality to rise in said vault and drains, and to force

[3] Approved in Austin & N. W. R. Co. v. Anderson, 79 Tex. 427, and expressly commended.

[4] Approved in Austin & N. W. R. Co. v. Anderson, 79 Tex. 427.

[5] Approved in Austin & N. W. R. Co. v. Anderson, 79 Tex. 427.

its way therefrom and through the intervening earth into the cellar of the plaintiff's house to the damage of the plaintiff; and that but for the closing of said gutters, and the negligence of the defendant in failing to keep said drains and vault clear and open and water tight, said waters would not have come into the cellar of plaintiff; then their verdict should be for the plaintiff.[6]

CHAPTER CXVII.

TAXATION.

Ejectment based on tax deed, 2755, 2756.
Forfeiture under West Virginia Revenue law, 2757-2759.

Ejectment based on tax deed.

(2755) The court instructs the jury that, upon the question of the title of the defendants, you are instructed that it is sufficient if you find that they were in possession of the same, and as a matter of right were entitled to such possession, with such an interest and right as could be enforced, even though the same may have been defective by reason of the loss of a deed or other defect. If they or their grantors were, in fact, the owners of the land it is sufficient, even though their chain of title is shown to have been at the time of the alleged sale deficient.[1]

(2756) The court instructs the jury that, if you find that the purchaser and holder of the certificate prior to the time of the alleged sale made a private bargain with the treasurer by which he was to take the lands; and that in pursuance of such private arrangement a certificate was made out to him, without said lands ever having been offered publicly, so that competition was or could have been had, and that it was

[6] Approved in Lion v. Baltimore City Passenger R. Co., 90 Md. 266.

[1] Approved in Chandler v. Keeler, 46 Iowa, 596.

essentially and entirely private; there then was no public sale, or such a sale as would convey to the alleged purchaser the title to the same. And if you find the facts to be that there was no sale, and that the defendants had title to the land at the time of the alleged sale, or that their grantor did, then you will find for the defendants.[2]

Forfeiture under West Virginia Revenue law.

(2757) The court instructs the jury that, if a person has his land charged upon the land books in a large tract that covers all his smaller tracts and it is not necessary for him to have it charged to him in the smaller tracts; and no forfeiture can accrue to those small tracts by reason of their not being so charged as small tracts, if they are included in the large tracts. In other words, coterminous tracts of land belonging to the same person for the assessment and payment of taxes, are the same as one tract.[3]

(2758) The court further instructs that forfeitures are deemed odious in law and will never be presumed, but must be strictly proved by the party relying on the same. And before the defendants can have the benefit of the forfeiture claimed by them or any of them for a failure of the plaintiffs, or those under whom they claim to have had the land in controversy placed upon the land books in R. County, and pay the taxes thereon for five successive years after the year 19—, the defendants must clearly prove that the said land or any part thereof in controversy, has not been upon the land books for those years, neither in large tracts nor small ones.[4]

(2759) The court instructs the jury that, if they believe from the evidence that prior to and at the time of the institution of this suit the plaintiff had a life estate in the premises in controversy; and that during the time she so had such life estate she permitted the defendant to enter upon said

[2] Approved in Chandler v. Keeler, 46 Iowa, 596.
[3] Approved in Maxwell v. Cunningham, 50 W. Va. 298.
[4] Approved in Maxwell v. Cunningham, 50 W. Va. 298.

premises, and become her tenant therein; then the jury is instructed that an assessment of said property in the name of the defendant, the tenant aforesaid, and the payment of the taxes on the property by such defendant while such tenancy continued, and before the plaintiff had any notice of a hostile holding of the premises by the defendant, would be a payment of the taxes for the plaintiff, and would inure to her benefit, and prevent a forfeiture of said land for failure to assess in her name.[5]

CHAPTER CXVIII.

TELEGRAPHS AND TELEPHONES.

Knowledge of importance of message, 2760.
Delay in delivery of message, 2761.
Statement of agent outside of office hours to bind company, 2762.

Knowledge of importance of message.

(2760) The court instructs the jury that, if you believe from the evidence that the agent knew of the importance of the prompt transmission and delivery of the message, or could have discovered it from the terms of the telegram or from other telegrams in reference to the same matter, the defendant would be chargeable with knowledge of the fact.[1]

Delay in delivery of message.

(2661) The court instructs the jury that, if from the evidence they believe that M., who delivered the message in question to the defendant company for transmission, gave to the defendant an incorrect or insufficient address, that in so doing he was guilty of negligence, as that term has been hereinbefore defined; and if the jury further believe from

[5] Approved in McDougal v. Musgrave, 46 W. Va. 509.
[1] Approved in Erie Telegraph Co. v. Grimes, 82 Tex. 89.

the evidence that such negligence on his part (if any) contributed to cause the failure to deliver the message to H.; then the plaintiff cannot recover, even though the defendant may have also been negligent.[2]

Statement of agent outside of office hours to bind company.

(2762) The court instructs the jury that no statement made or action taken by defendant's agent and operator, B., before its office opened for business, and when said agent and operator was at home, or not in the service of the company or engaged in the functions of his position, was binding upon the defendant; nor can the defendant be held liable therefor, as the responsibility of the company began when the message was filed with it for transmission.[3]

CHAPTER CXIX.

TOWING.

Excuse for running on well known obstruction, 2763.
Knowledge of defects, 2764.
Duties of steam tug, 2765.

Excuse for running on well known obstruction.

(2763) The court instructs the jury that running upon a well-known obstruction or shore can only be excused by some peril of the sea which rendered the accident unavoidable—with the exercise of skill and good judgment.[1]

Knowledge of defects.

(2764) The court instructs the jury that the only fault in the case was an improper cleat upon the spile-driver

[2] Approved in Hargrave v. Western Union Tel. Co. (Tex. Civ. App.) 60 S. W. 687.

[3] Approved in Hargrave v. W. U. Tel. Co. (Tex. Civ. App.) 60 S. W. 687.

[1] Approved in George v. Carpenter, 73 Hun, 221.

that would not, of itself, be sufficient to charge the defendants; unless you find, also, that the facts were of such a character that the defendants knew, or ought to have known, of the defective character of the cleat.[2]

Duties of steam tug.

(2765) The court instructs the jury that the Duluth canal at the time in question was designed for the passage of craft through its waters in opposite directions at the same time. It was, therefore, the duty of defendants when they entered the canal to have exercised ordinary care to so manage, control and confine the movements of their tug and scow as to avoid injury to plaintiff's works, either by forcing into or upon them incoming vessels which they might reasonably have anticipated as liable to meet, or otherwise; and they should have provided such amount of power to control the movements of the scow, and adopted such method of attachment to the tug, as under all the surrounding circumstances, this degree of care would require. It was their duty to exercise a like degree of care to so manage and control their scow while in the canal, as to leave a passageway unobstructed of sufficient width to permit the passage in safety of all incoming craft which they might reasonably have anticipated as liable to meet.[3]

[2] Approved in Bust v. Cornell Steamboat Co., 24 Fed. 188.

[3] Approved in Butler-Ryan Co. v. Williams, 84 Minn. 447.

CHAPTER CXX.

TRESPASS.

When action lies, 2766.
Title to sustain action, 2767.
Trespass against overseer of highways, 2768.
Liability for breaking or entering into plaintiff's house and taking away furniture, 2769.
Justification under license, 2770, 2771.

When action lies.

(2766) The court instructs the jury that this is an action of trespass brought by plaintiff against the defendant for forcibly evicting him from the premises described in the declaration; and that in order to maintain such action as against defendant, it is only necessary for the plaintiff to prove that he was in actual and peaceable possession of the property on which a trespass was alleged to be committed, and that such defendant unlawfully interfered with such possession, or caused the unlawful interference therewith (here state the facts which would constitute an unlawful interference).[1]

Title to sustain action.

(2767) The jury are instructed that a title in fee was not essential to the maintaining of an action of trespass by one having the actual possession, against a stranger to the title, and not in possession; and, that no person can purge a disseizin by an entry, who is not the true owner, or who does not make the entry by authority of the true owner.[2]

Trespass against overseer of highways.

(2768) Although the jury may find that one or more defendants did not engage in tearing down or removing plain-

[1] Beidler v. Fish, 14 Ill. App. 29.
[2] Gardner v. Gooch, 48 Me. 487.

tiffs' fence or gates; yet, if the jury find that such defendant or defendants were present and did aid, abet or encourage the parties engaged in the act; such defendant or defendants are liable in this action to the same extent as the parties actually engaged in the act.[3]

Liability for breaking or entering into plaintiff's house and taking away furniture.

(2769) The court instructs the jury that it is for them to determine from all the evidence and circumstances proven in the case, whether the (piano forte) in question was the property of the plaintiff or that of the defendants at the time the same is alleged to have been taken from the house of the plaintiff; and the jury should determine this from the evidence in the case; and the jury are not bound to take the copy of the agreement in respect to the piano, introduced in evidence, as conclusive upon this point, but should consider the entire evidence in the case; and if the jury believe from all the evidence in the case that the defendants sold the (piano forte) to the plaintiff at an agreed price of —— dollars, with a discount from that of —— dollars, to be paid for in monthly installments; and if the jury further believe from the evidence and circumstances proven in the case that the plaintiff had fully paid the agreed price to defendants at the time of the alleged taking by them of the piano; and if the jury further believe from the evidence that the dwelling-house of the plaintiff was broken into, against the will of the plaintiff, and the piano carried away by the direction or connivance of the defendants; the jury should find for the plaintiff, and against such of the defendants as are shown by the evidence participated, aided or encouraged in the commission of the acts complained of.[4]

Justification under license.

(2770) The court instructs the jury, that if they believe

[3] Approved in McBeth v. Trabue, 69 Mo. 642.

[4] Bauer v. Bell, 74 Ill. 223.

from the evidence that defendant entered the house of plaintiff by his leave and license, or by the leave or license of any inmate of plaintiff's house authorized to give a license, such entry was not a trespass.[5]

(2771) The court instructs the jury that, in order to constitute a license to enter, it is not necessary that plaintiff should expressly authorize defendant to enter; but if the jury believe from the evidence that defendant went to plaintiff's house to see him on business, and was allowed to enter, and those with defendant were allowed to enter with him, this will be deemed a license.[6]

CHAPTER CXXI.

USE AND OCCUPATION.

Amount of rent, 2772, 2773.
Liability to vendee of landlord, 2774, 2775.

Amount of rent.

(2772) The court instructs the jury that, if they believe from the evidence, that defendant occupied the premises in question from —— to —— under an understanding or agreement with the owners thereof that they should pay only a fair and reasonable rent therefor, the jury in determining what was a fair and reasonable rent, should take into consideration the condition of the premises, and the occupancy by the plaintiff of a part of the premises.[1]

(2773) The court instructs the jury that, if they believe, etc., that no price or time of payment for rent was agreed upon, but it was understood or agreed that the rent was to be for the year in question (only a reasonable rent), and that defendants occupied the premises in question on ——,

[5] Cutler v. Smith, 57 Ill. 252.
[6] Cutler v. Smith, 57 Ill. 252.
[1] Price v. Pittsburg, Ft. W. & C. R. Co., 34 Ill. 13.

19—, and thereafter until ———, 19—, for a coal yard and for the coal business, and rented the lots for that purpose; and the owners of the lots knew, when they rented the premises that they were to be used in that business; then the jury, in determining what the rent should be, should consider what the rent of the premises was worth in that particular business, and may take into account such inconvenience, or interruption, if any, to that kind of business as occurred in consequence of the use of a portion of the lots by the plaintiff.[2]

Liability to vendee of landlord.

(2774) The court instructs the jury that, where a tenant occupying land under a parol lease holds over without any new agreement as to rent after the expiration of his term, and after the sale of the land by his landlord, such holding over will be construed to be a holding over under the terms of the lease, and the same rate of rent may be recovered from the tenant by the vendee of the landlord in an action of assumpsit for use and occupation; and if the jury believe from the evidence that plaintiff purchased the lot described in the declaration from C, and that defendant had before the purchase by plaintiff from C occupied the same under a parol lease at a rate agreed upon between C and defendant, and that defendant held over after the expiration of said term without any new agreement, other than the law implies; then the jury will find that the same rate of rent shall be paid for said lot by the defendant after as before said purchase, and the jury will not take into consideration the alleged condition and want of repair of the said lot, without proof of an express covenant to put or keep the said premises in repair by plaintiff or his grantor.[3]

[2] Price v. Pittsburg, Ft. W. & C. R. Co., 34 Ill. 13

[3] Price v. Pittsburg, Ft. W. & C. R. Co., 34 Ill. 13.

(2775) The court instructs the jury that, as to the lot purchased by plaintiff of S., if they believe, etc., that defendant occupied said lot after the purchase of the same by plaintiff, then plaintiff is entitled to recover for such use and occupation in this action what the evidence shows the same to have been worth, if that was the agreement with S., and defendant was holding under such agreement; and if the evidence shows that during the time the said premises were so occupied by defendant, the plaintiff had occasion to use and did use a part of said premises, then the jury will allow to the plaintiff the full value of the whole lot up to the time of such occupation of part, and for the remainder of the time during which the lot was occupied by defendant, they will allow whatever the same was worth after such occupation of part. This is so, if it was the understanding that, in case the plaintiff should purchase the premises in question, he might take the possession of such part of the lot as he might need, allowing to the tenant the right to occupy the balance of the lot, paying therefor a reasonable rent.[4]

CHAPTER CXXII.

USURY.

Plea of usury in action on note by purchaser, 2776-2778.
Defense in action on promissory note of payment of usurious interest exceeding balance due on note, 2779.
Recovery back of interest, 2780-2782.

Plea of usury in action on note by purchaser.

(2776) The court instructs the jury that, if they believe from the evidence that the note sued on in this case was entered into without any consideration, and that the plain-

[4] Price v. Pittsburg, Ft. W. & C. R. Co., 34 Ill. 13. Plaintiff in this case is the railroad company.

tiff had notice of that fact before or at the time of the assignment to him, then the jury should find for the defendant.[1]

(2777) The court instructs the jury that a note given wholly for usury is an unlawful consideration; and if the jury believe from the evidence that the note in question was given wholly for usury, then they should find for the defendant, if they also believe from the evidence that the defendant had notice before he purchased the same that it was given wholly for usury.[2]

(2778) The court instructs the jury that, if they believe from the evidence that the only consideration of the note sued upon in this action was for illegal interest, then the jury should find for the defendant; provided they also believe from the evidence that the said defendant bought said note after it became due, or had notice that it was given wholly for illegal interest.[3]

Defense in action on promissory note of payment of usurious interest exceeding balance due on note.

(2779) The court instructs the jury that, under the issues in the case, if they believe from the testimony that the defendant borrowed from the plaintiff $—— on or about the —— day of —— 19—, for which defendant gave the note sued on with defendant, ———, the said ———, being, in fact, only security on said note; and that at the time the money was borrowed the plaintiff and defendant agreed that defendant should pay, beside the interest mentioned in the note, interest at the rate of six per cent per annum in addition; then said additional interest was and is usury, and against the statute of the State. And if, from the testimony in the case, the jury believe that defendant has paid interest on said note at the rate of sixteen per cent per annum,

[1] Harvey v. Ellithorpe, 26 Ill. 418.
[2] Harvey v. Ellithorpe, 26 Ill. 418.
[3] Harvey v. Ellithorpe, 26 Ill. 418.

then, under the law in this state, the plaintiff cannot recover any interest whatever on the principal of the said note; and whatever payments the evidence in this case may show the defendant has paid on said note as interest, must be allowed on the principal of the said note. And if the sum actually paid, according to the evidence, amounts to more than the sum of —— (the amount borrowed), then the defendants are entitled to a verdict in this case.[4]

Recovery back of interest.

(2780) The court instructs the jury that the plaintiff must set out and prove a loan to him, or contract between the plaintiff and defendant, and that, on that loan or contract so proved, excessive interest was retained or received by the defendant; that it must be a loan made by the defendant to the plaintiff, and the excessive interest must be received from him on that loan, and that it must be a loan on which the plaintiff was legally liable to the defendant.[5]

(2781) The court instructs the jury that, if the plaintiff paid to the defendants the sum of ten or twelve thousand dollars, or any part of this sum, in excess of the amount of the notes and ten per cent interest, and also in excess of all sums voluntarily paid as a bonus of one shilling per thousand for the use of the money; and made such payments by reason of the threats of the defendants, or either of them to seize and sell his vessel, unless he did so pay; and plaintiff would not have paid the same but for such threats; then such payment was not voluntary, and the plaintiff is entitled to recover back such excess from the defendants with interest from the —— day of ——, 19—, to the present time at seven per cent per annum.[6]

(2782) The court instructs the jury that, if you find

[4] Approved in Reinback v. Crabtree, 77 Ill. 182.

[5] Holmes v. Gerry, 55 Me. 299.

[6] Approved in Dykes v. Wyman, 67 Mich. 236.

from the evidence that the plaintiff supposed when he paid the shilling a thousand to the defendants that it was a bonus, and that he had agreed to pay it as a bonus, and did so pay it, he cannot recover for such payments; if he agreed to pay the shilling a thousand as a bonus, then, if he knew at the time of the payment of the shilling per thousand that it was a bonus and so paid it, he cannot recover in this action.[7]

CHAPTER CXXIII.

VALUES.

Consideration mentioned in deed, 2783.
Sales of similar property, 2784.

Consideration mentioned in deed.

(2783) The court instructs the jury, that the consideration mentioned in the deeds offered in evidence by the plaintiff to prove title, are not to be regarded by the jury as any evidence of the value of the property at the time of the fire.[1]

Sales of similar property.

(2784) The court instructs the jury to take into consideration, in determining the value of the property condemned, the evidence of all the witnesses,—of course disregarding any evidence introduced and afterwards stricken out by order of the court,—and the evidence of sales of similar property, as well as the knowledge the jury may have derived from an examination of the premises appropriated by the defendant.[2]

[7] Approved in Dykes v. Wyman, 67 Mich. 236.
[1] Approved in Chicago & A. R. Co. v. Pennell, 110 Ill. 435.
[2] Tedens v. Sanitary District of Chicago, 149 Ill. 87.

CHAPTER CXXIV.

VENDOR AND PURCHASER.

Presumption of sale, 2785.
Effect of misdescription in deed, 2786.
False representations—Right of purchaser to relief, 2787.
Effect of misrepresentation as to amount of property and as to quality of land, 2788.
Undue influence—Elements of transaction, 2789.
Action for price—Set-off of damages sustained through false representations, 2790.
Measure of damages—Effect of deficiency in the property conveyed, 2791, 2792.

Presumption of sale.

(2785) The court instructs the jury that a deed or sale may be shown by circumstances like any other fact, the presumption being a question for the decision of the jury. [And in this connection the jury are advised that up to January 18, 1840, a verbal sale accompanied with possession, was as valid as a written one.] If, then, the jury believe upon a fair consideration of all the circumstances in the case—those which the jury may believe to favor such presumption—that the circumstances are consistent with the inference or presumption that such sale, release or deed was made as claimed by defendant and interveners, and that in view of all the circumstances it is more reasonably probable that such sale, release or deed was made, than that it was not; then the jury are at liberty to presume and find that it was; and if the jury decide the issues in favor of the weight of the evidence, and on the point to be determined by them do so presume and find, let the verdict be for the defendants and interveners without regard to the other issues submitted. But, if the jury do not so presume, let the verdict be determined under the instructions upon the other issues submitted.[1]

[1] Approved in Herndon v. Burnett, 21 Tex. Civ. App. 25.

Effect of misdescription in deed.

(2786) The court instructs the jury that the contract made 10th June, 1868, by H. and S., for the sale of the tract of land in controversy in this suit, describes said land as being the same land which was conveyed to said H. by M. and wife, by deed dated —— ——, and of record in the clerk's office of R. county, and that said deed describes the said tract as including a mountain tract of — acres; and that said S. must be held to have had knowledge of that deed and of all it contains, and of the fact that the said tract included the said mountain tract of — acres when the contract of sale was made. But, in deciding the issues in this case, it is the province and duty of the jury to consider all the evidence that has been offered before them, both by plaintiff and defendant, whether written or oral.[2]

False representations—Right of purchaser to relief.

(2787) The court instructs the jury that a false representation of a material fact, constituting an inducement to the contract, on which the purchaser had a right to rely, would entitle the purchaser to relief, although the party making the representation was ignorant as to whether it was true or false; and the real inquiry is not whether the vendor knew the representation to be false, but whether the representation was false and the purchaser believed it to be true, and was misled by it in entering into the contract.[3]

Effect of misrepresentation as to amount of property and as to quality of land.

(2788) The court instructs the jury that the burden of proof of the issues before the jury rests on the plaintiff S.; and it is the duty of the jury to weigh well all the evi-

[2] Approved in Snouffer's Adm'r v. Hansbrough, 79 Va. 166.

[3] Approved in Snouffer's Adm'r v. Hansbrough, 79 Va. 166.

dence before them, as well the written contract of sale, and the deeds, and the answer of H., and the depositions of the absent witnesses, as the testimony of the witnesses who testified in the presence of the jury; if, from all the evidence, the jury do not believe that it has been clearly proven that the defendant, H. did, before the sale, misrepresent to S., as charged in his bill, that the line of the tract of land ran only to the foot of the mountain, that the tract embraced no mountain land, and no land which was not tillable, and no land on which a four horse wagon could not run or be turned, and also that the said S. was induced by these misrepresentations, or by the fraud of H. or his agent, to purchase said tract of land; then the court instructs the jury to find for the defendant. But the court further instructs the jury that, if they believe from the evidence that S. was induced to make the purchase of the land by the misrepresentations of H., as to either of the matters set forth in the instruction of the plaintiff, whether these misrepresentations were made willfully or through ignorance; then they must find for the plaintiff in the first issue.[4]

Undue influence—Elements of transaction.

(2789) The jury are instructed that the question of determining whether the deed from Plummer to Kate Christopher, was obtained by fraud or undue influence, is a question peculiarly within the province of the jury to decide from all the evidence; and in determining this question, the jury must take into consideration the relationship existing between Plummer and Kate Christopher at and before the time of the making of the deed, the ages of the respective parties, the amount of the consideration (if any) having been paid for the deed, the understanding of the parties as to the condition upon which the deed should

[4] Approved in Snouffer's Adm'r v. Hansbrough, 79 Va. 166.

be made, (if there was any understanding,) and all the other circumstances surrounding the transaction.[5]

Action for price—Set-off of damages sustained through false representations.

(2790) The court instructs the jury that the plaintiff is entitled to recover the amount due on said notes, unless the jury find that the plaintiff made false representations in regard to the quality, improvements and natural advantages of said land; and if they find that he made such representations, then the jury can only deduct from the amount of said notes the value of the injury sustained by defendant on account of such false representations.[6]

Measure of damages—Effect of deficiency in the property conveyed.

(2791) The court further instructs the jury that, if they believe from the evidence that G., in estimating the value of the land purchased by him from said S., and in fixing the price he agreed to pay for it, did not give or fix any special value per acre to the land in controversy over and above the average value per acre of the whole land; and if they further believe that the plaintiff is entitled to recover damages; then they must fix the damages for the land lost, at the average price per acre of the land sold by said S. to said G.[7]

(2792) The court further instructs the jury that, if they shall believe from the evidence that S. sold and conveyed to plaintiff the tract of land in the deed mentioned, supposing the said tract of land to contain — acres as set forth in the said deed; and that the land in controversy was embraced within the boundaries of said deed, but that the said land was at the time owned by C. and in his open and notorious possession; and that the said S. did not sell or

[5] Approved in Staley v. Housel, 35 Neb. 160.

[6] Approved in House v. Marshall, 18 Mo. 369.

[7] Approved in Sheffey's Ex'r v. Gardiner, 79 Va. 313.

intend to sell, and that the said plaintiff did not buy or intend to buy the land in controversy, but that it was afterwards ascertained that by reason of embracing the said land in said boundary, there is a deficiency in the number of acres in said tract of land; then the measure of plaintiff's damages is the average value per acre of said deficiency to be ascertained by the purchase price agreed to be paid therefor.[8]

CHAPTER CXXV.

VERDICT.

Form of verdict, 2793.

Form of verdict.

(2793) The court instructs the jury that the plaintiff has sued upon six different notes, each of which constitutes a separate and distinct claim or cause of action in plaintiff's petition. Those claims are called "counts" in the instructions to you by the court. Your verdict should state your finding or decision as to each count or cause of action separately. And if your finding is for the plaintiff, as to any one or more counts, you should also state in your verdict the exact amount which you find from the evidence to be still due and unpaid at the present time (including principal and interest to date) on each particular note mentioned in the count or counts of the petition on which you may so decide to find for plaintiff.[1]

[8] Approved in Sheffey's Ex'r v. Gardiner, 79 Va. 313.

[1] Approved in Chicago Title & Trust Co. v. Brady, 165 Mo. 197.

CHAPTER CXXVI.

WAREHOUSEMEN AND WAREHOUSE RECEIPTS.

Who is warehouseman—What is a warehouse, 2794, 2795.
Sufficiency of delivery to and possession by warehouseman, 2796.
Diligence, 2797.
Place or kind of storage, 2798-2800.
Same—Modern devices and safe guards, 2801.
Insurance, 2802.
Failure to keep quantity of grain on hand, 2803, 2804.
Redelivery in kind, but not in specie, 2805-2807.
Same—Return of identical thing stored as condition precedent to action, 2808.
Lien and charge for storage, 2809-2813.
Action for storage—Liability of purchaser of goods stored, 2814-2817.
Same—Evidence and presumptions, 2818-2822.
Same—Liability of transferee of warehouse receipt, 2823, 2824.
Warehouse receipts—Negotiability, 2825.
Same—Erroneous description of goods, 2826.
Same—Effect of transfer, 2827.

Who is warehouseman—What is a warehouse.

(2794) The court instructs the jury that in order to find that defendant was a warehouseman, they must find from the evidence that he received goods and merchandise to be kept and cared for in his warehouse for hire.

(2795) The court instructs the jury that, in order to constitute a warehouse, no particular kind or description of a building is required. It is sufficient that the building be used for the storage of goods for hire, or that any apartment of a building be used for that purpose.[1]

Sufficiency of delivery to and possession by warehouseman.

(2796) The court instructs the jury that it is not necessary that the property should have come fully into the possession of (defendant) in order that his duty as a warehouseman may have attached, nor is it necessary that the prop-

[1] Owen v. Boyle, 22 Me. 47.

erty should have been stored in his warehouse, but it is sufficient if you find that it was received upon (defendant's) premises, or was put under his control, so that it may be said to have passed from the possession and control of (plaintiff, or give name of the owner or bailor) into the possession and control of (defendant, or give name of the warehouseman).[2]

Diligence.

(2797) The court instructs the jury that one who undertakes to care for or provide custody of goods for hire, is bound to exercise ordinary diligence in performing the terms of his undertaking, and is liable for ordinary negligence in case of loss or injury to the property bailed.[3]

Place or kind of storage.

(2798) The court instructs the jury that a custodian for hire must use reasonable care and diligence in providing a safe and proper place for the storage of goods, having respect to the nature and value of the article to be stored and to the condition of the country or climate, and taking such precautions and providing such safeguards as persons engaged in the same line of business customarily provide.[4]

(2799) The court instructs the jury that a warehouseman need only provide reasonably fit and safe storage, and that he is not required to construct buildings secured from all possible contingencies. They need only be reasonably and ordinarily safe against ordinary and common occurrences.[5]

(2800) The court instructs the jury that, if the jury believe from the evidence that the plaintiffs had given a warehouse receipt for the corn, as being in a certain warehouse, then they could not charge the defendant C. for storing it in any other place, unless the defendant assented to its being stored in another place, or unless some other prior

[2] Ducker v. Barnett, 5 Mo. 97.
[3] Story on Bailments, § 144.
[4] Cowles v. Pointer, 26 Minn. 253.
[5] Cowles v. Pointer, 26 Minn. 253.

holder of the receipt had assented to it, and C. had notice of it when he purchased.[6]

Same—Modern devices and safe guards.

(2801) The court instructs the jury that a warehouseman is not required to provide absolute safety for the goods, and is not liable as an insurer. He need not use the newest or the best appliances and devices to insure the safety of the goods, but is only required to use those which are so far modern and approved that they are ordinarily used by those engaged in like pursuits.[7]

Insurance.

(2802) You are instructed that one who receives goods to be stored for him is not ordinarily required to insure the goods for the protection of the owner; but he must do so if it was so agreed with the owner, or if circumstances exist by reason of which an ordinarily and reasonably careful warehouseman would insure. If you find from the evidence that such an agreement or understanding existed, or that such ordinary and reasonable care would have required an insurance, then defendant's failure to insure will make him liable.[8]

Failure to keep quantity of grain on hand.

(2803) The court instructs the jury that, if the jury believe from the evidence that there was not sufficient corn in the warehouse of T. & B. at any time when called for by C., the holder of the receipt, to fill the demand made by him, they will find a verdict in favor of the defendant.[9]

[6] Approved in Cole v. Tyng, 24 Ill. 100.

[7] Titus v. Railroad Co., 136 Pa. St. 348.

[8] Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 527; Baxter v. Hartford Ins. Co., 11 Biss. (U. S.) 306; Lancaster Mills v. Merchants' Cotton Press Co., 89 Tenn. 1; Story on Bailments, § 456.

[9] Approved in Cole v. Tyng, 24 Ill. 100.

(2804) The court instructs the jury that the plaintiffs could not charge for storing the corn, unless they stored their corn or an equal amount of other corn for the defendant, to fill his order when demanded.[10]

Redelivery in kind, but not in specie.

(2805) The court instructs that at the end of the term of storage, or on demand of the owner and payment of charges, it is ordinarily the duty of the warehouseman to redeliver to the owner the identical property; but the jury is instructed that, if the evidence in this case shows that the property stored was of such kind as usage and the general course of business permits to be delivered in like property of the same kind, then (give name of the warehouseman) liability is discharged, if he redelivered property of the same kind, grade, quality, quantity and value.[11]

(2806) The court instructs the jury that, if the jury believe from the evidence that the plaintiffs, T. & B., had grain enough on hand to supply the demand of defendant, C., and were ready and willing to deliver the same at all reasonable hours when called for, it shows a performance of their contract, so far as the question of delivery is concerned.[12]

(2807) The court instructs the jury that, when grain on store in a warehouse is, by consent of the owner, mixed with other grain, though the owner in such case loses his right of property in the specific grain stored, he becomes entitled to an aliquot share of the common mass; and the acceptance by him, without objection, of a like amount from such common mass, and with knowledge that it is not the identical grain stored, estops him from refusing to pay storage on the

[10] Approved in Cole v. Tyng, 24 Ill. 100.

[11] Dole v. Olmstead, 36 Ill. 150; Id., 41 Ill. 344; Preston v. Witherspoon, 109 Ind. 457; Rice v. Nixon, 97 Ind. 99; National Exchange Bank v. Wilder, 34 Minn. 149.

[12] Approved in Cole v. Tyng, 24 Ill. 100.

ground that he did not receive back the identical grain delivered by him to the warehouseman.[13]

Same—Return of identical thing stored as condition precedent to action.

(2808) The court instructs the jury that, if the jury believe from the evidence that K. owned a quantity of corn in the warehouse of plaintiffs, T. & B., which was subject to storage, or liable to become so, and that he sold the corn to defendant, C., with the understanding that said corn would become or was subject to storage, then plaintiffs became liable to account to defendant for such corn from the time they knew of his purchase, and had a lien on the corn for any storage that might be due them at the time of delivery; and if the jury should further believe from the evidence that other corn was delivered by plaintiffs to defendant in lieu of that originally purchased, and that the same was accepted by defendant, with knowledge that it was different corn, and without objection made on that account by defendant, the fact that the corn delivered was not the same bought, would not divest the lien for storage, or deprive plaintiffs of any right they might otherwise have to recover for such storage.[14]

Lien and charge for storage.

(2809) The court instructs the jury that, if the jury believe from the evidence that the plaintiffs had no contract express or implied with C. (a purchaser), by which C. was bound to pay for the storage, then, although the plaintiffs had a lien on the corn for storage, yet, if they delivered the corn to C. without insisting upon such lien, they could not afterwards recover of C. for the storage.[15]

(2810) The court instructs the jury that a warehouseman who receives corn or other grain in store to be delivered at a future day, is responsible for its safe delivery to whoever may

[13] Approved in Cole v. Tyng, 24 Ill. 100.
[14] Approved in Cole v. Tyng, 24 Ill. 100.
[15] Approved in Cole v. Tyng, 24 Ill. 100.

be authorized to receive it at the time of delivery, whether he was the owner when it was stored or not; and is entitled to a lien upon the property stored for any charges he may rightfully have for storage on it in the meantime, and has the right to enforce said lien against said property at or before the delivery of the same, unless provided otherwise by contract between the owners; and the fact that the grain stored may have been mixed with other grain, so that the identity of this particular grain is lost, did not affect the right to storage, provided such mixture was made with the consent of the owner, and the warehouseman has on hand during the time a sufficient quantity of grain of like quality to meet the demand and to be delivered when called for.[16]

(2811) The court instructs the jury that, if they shall believe from the evidence in this case that the defendant received the property sued for as warehouseman, and paid the carrier the sum of — which had accrued for the carriage of the goods, and afterwards kept the goods sued for in store, defendant had a right to retain possession of the property until the sum advanced by the defendant and charges for storage were paid; and the jury are instructed that to constitute a legal tender, the money must be actually produced to the party who is entitled to recover it; and if the jury shall believe from the evidence under the instruction given, that the defendant had a lien upon the property sued for, then, before defendant can be charged with having converted the property, the jury should be satisfied from the evidence that the amount of the lien was tendered the defendant, and that upon such tender defendant refused to deliver the property; though, if the jury should further believe from the evidence that defendant offered to pay the actual amount due for such charges and advances, and that defendant claimed a larger sum, and refused to deliver the property constituting the

[16] Approved in Cole v. Tyng, 24 Ill. 100.

subject-matter of this suit, unless such larger sum was paid; then an actual tender was not necessary.[17]

(2812) The court instructs the jury that, if they believe from the evidence that the defendants, or one of them, received the goods in question, as stated; and that they had a lien upon said goods for advances and storage, as stated in another instruction; and that they had possession of said goods and continued in such possession to the (state what time); then they had a right to retain possession of the property until the amount of the charges and advances be paid or tendered.[18]

(2813) The court instructs the jury that a warehouseman, on receiving goods in the regular course of his business, has a lien upon the goods for any advances which he may have made to the carrier, which may have accrued for the carriage of the goods, and also for his reasonable charges for storage of the goods, if he shall have kept them in store, and has a right to retain possession of the property until such advances and charges are repaid to him. And if the jury still believe from the evidence in this case that the defendants, or one of them, in the summer of —— received the property in question, as warehouseman, and paid to the carrier the sum of sixty-one dollars and fourteen cents, which had accrued for the carriage of the goods, and afterwards kept the goods in store, they had a right to retain the possession of the property until the sum advanced by them and charged for storage was paid to them.[19]

Action for storage—Liability of purchaser of goods stored.

(2814) The court instructs the jury that, if they find from the evidence that the defendant, C., owned the corn when the storage sued for in this case accrued, and purchased the

[17] Hale v. Barrett, 26 Ill. 195.
[18] Hale v. Barrett, 26 Ill. 195.
[19] Hale v. Barrett, 26 Ill. 195.

corn of K. with the knowledge that it would be liable to storage if left in the warehouse of the plaintiffs after a certain date, and with the understanding that he was to pay any storage which might accrue; then, if the jury should further believe from the evidence that storage did rightfully accrue to the plaintiffs upon such corn; the jury should find for the plaintiffs the amount of such storage, subject to any set-off which may be proved or admitted in the case.[20]

(2815) The court instructs the jury that, if the plaintiffs delivered the corn to C. (he was a purchaser from the original storer), without claiming in any manner that they had any right to charge storage, and they had no contract with C., express or implied, by which C. was bound to pay storage; this is prima facie evidence that they had not and have not a right to recover for the storage of C.[21]

(2816) The court instructs the jury that, if the jury believe that C. (the owner by purchase,) permitted the corn to remain in the warehouse at the instance and request of the plaintiffs, and for their benefit, the plaintiffs cannot recover storage for it while it so remained.[22]

(2817) The court instructs the jury that, unless the jury believe from the evidence that there was a contract, express or implied, between the plaintiffs or their agent and C. (who purchased from the owner) or his agent, that C. should pay the plaintiffs for storage, they will find for the defendant.[23]

Same—Evidence and presumptions.

(2818) The court instructs the jury that, if the jury believe from the evidence that after the alleged storage the plaintiffs had a full settlement of their accounts against C., and made no charge for storage, the presumption is that they

[20] Approved in Cole v. Tyng, 24 Ill. 100.
[21] Approved in Cole v. Tyng, 24 Ill. 100.
[22] Approved in Cole v. Tyng, 24 Ill. 100.
[23] Approved in Cole v. Tyng, 24 Ill. 100.

had no just account against C. for storage up to the time of such settlement.[24]

(2819) The court instructs the jury that the contract offered to the jury between K. (the original owner) and C. (the purchaser), is no evidence of an express agreement between plaintiffs and C. that C. should pay the plaintiffs for storage.[25]

(2820) The court instructs the jury that an implied contract to pay the storage in question may arise from facts and circumstances detailed in evidence, and it is not necessary to raise such implication that there should be positive proof.[26] proof.[26]

(2821) The court instructs the jury that, though a settlement of acceptance is prima facie evidence of payment of prior demands, yet it is not conclusive evidence, and is subject to be rebutted by proof that any particular account was not paid.[27]

(2822) The court instructs the jury that, if the jury believe from the evidence that K. was to pay storage on the corn after (June 1, 1855), and that C. purchased the corn subject to the same conditions; and if they further believe that the plaintiffs stored the corn, or any part thereof, after (June 1, 1855), and that they delivered the corn from time to time to C., as called for by him; the jury should allow the plaintiffs a reasonable compensation for such storage, if the jury further believe that the defendant purchased the receipt and corn of K., and that he took it subject to the claim of the plaintiffs for storage.[28]

Same—Liability of transferee of warehouse receipt.

(2823) The court instructs the jury that, if the jury be-

[24] Approved in Cole v. Tyng, 24 Ill. 100.
[25] Approved in Cole v. Tyng, 24 Ill. 100.
[26] Approved in Cole v. Tyng, 24 Ill. 100.
[27] Approved in Cole v. Tyng, 24 Ill. 100.
[28] Approved in Cole v. Tyng, 24 Ill. 100.

lieve from the evidence that a warehouse receipt was given by the plaintiffs, T. and B., for the corn in question, and that the same was assigned to defendant, C., then all the provisions of said receipt should take effect, as well against as in favor of C.; and if, by such receipt and the proofs in the case storage was properly chargeable on the corn when delivered to C., the liability to pay rests on C.[29]

(2824) The court instructs the jury that if the jury believe, from the evidence, that defendant, C., purchased the receipt from W., K. & Co., then Cole took the receipt subject to the same conditions, and the claim of the plaintiffs for storage in the same way that W., K. & Co. would have been, had they held the same.[30]

Warehouse receipts—Negotiability.

(2825) The court instructs the jury that warehouse receipts are not negotiable in a legal sense, so as to enable the person holding them to transfer a greater right to property mentioned in them than he himself had; their only office is to stand in the place of the property itself * * * for the convenience of the parties interested in the property. The delivery of the receipt has the same effect as the delivery of the property, no greater and no less.[31]

Same—Erroneous description of goods.

(2826) The court instructs the jury that language in a warehouse receipt, designating the property stored as so many packages of a certain commodity, is merely matter of description; that it is not practicable for a warehouseman to open and examine packages delivered to him for the purpose of determining the real nature of the contents, and if the contents are spurious and fictitious, the warehouseman is not responsible to a transferee of the warehouse receipt.[32]

[29] Approved in Cole v. Tyng, 24 Ill. 100.
[30] Approved in Cole v. Tyng, 24 Ill. 100.
[31] Approved in Burton v. Curyea, 40 Ill. 320.
[32] First Nat. Bank of Chicago v. Bean, 137 N. Y. 110.

Same—Effect of transfer.

(2827) The court instructs the jury that, if the jury believe from the evidence that the plaintiffs, T. & B., during the spring and summer of 19—, were engaged in the business of buying and selling corn, and storing the same; and if they further believe that the defendant held a warehouse receipt for corn; this alone would not constitute a delivery of the corn, but it would be an acknowledgment by T. & B. that they had on hand the quantity of corn mentioned in the receipt, and an agreement to deliver the quantity of corn mentioned in the receipt to the person entitled to receive the same.[33]

CHAPTER CXXVII.

WATERS AND WATERCOURSES.

Percolating waters, 2828.
Liability for destroying spring, 2829.
Diversion of spring by removal of coal, 2830.
Obstruction of watercourse, 2831.
Liability for casting refuse matter into river, 2832, 2833.

Percolating waters.

(2828) The court instructs the jury that water percolating through the ground beneath the surface, either without a definite channel or in courses which are unknown and unascertainable, belongs to the realty in which it is found; and if the jurors believe from the evidence that the water found on the premises of defendant percolates through the ground beneath the surface, either without a definite channel or in a course which is unknown and unascertainable, then the plaintiff cannot recover in this action; although they may further believe from the evidence that said water percolating through the ground comes from the spring on land of F., mentioned in plaintiff's petition.[1]

[33] Approved in Cole v. Tyng, 24 Ill. 100.

[1] St. Louis Trust Co. v. Bambrick, 149 Mo. 560. Instruction set

Liability for destroying spring.

(2829) The court instructs the jury that, if they believe from the evidence that the spring described in the deed to the plaintiff—which deed has been offered in evidence in this case—supplied, at the time the said deed was executed sufficient pure water for the use of plaintiff's stock; and shall further believe from the evidence that the defendant has destroyed said spring and the stream which supplied the same; or, if they shall believe from the evidence that the defendant has so permanently injured the said spring and stream that the spring does not now furnish sufficient water for the use of plaintiff's stock, or is so impure as to be unfit for the use of such stock, and such impurity will be permanent; and plaintiff is injured thereby; then the jury may give such damages to plaintiff as they shall believe the plaintiff has sustained because of such destruction or injury of the spring, if the jury shall believe that such spring has been destroyed or injured.[2]

Diversion of spring by removal of coal.

(2830) The court instructs the jury that, where the owner of coal conveys the coal to another who has a right to remove the coal, and such party in so doing should interfere with the hidden streams of water which may be running through the earth, and thus drain the spring of another, he would not be liable for damages, if the spring failed simply because in the ordinary operation of the mine some subterranean stream was tapped and by this means the water, in place of flowing to the opening in the ground where the stream was, flowed to some other place,—since he has a right to take out his coal; and if a hidden spring is interfered with it cannot be helped, and he cannot be held responsible, for he would not know where those hidden streams were. Notwith-

out in opinion and not criticised. The case was reversed for the giving of an erroneous instruction as to the measure of damages.

[2] Chamberlain v. Baltimore & O. R. Co., 66 Md. 518.

standing that is the case, he is required to leave enough coal to support the surface; and if he takes all of the coal, he must substitute sufficient support to keep the surface in place. If he fails to leave sufficient support, and by reason of this failure the ground sinks, subsides and cracks, and that sinking and cracking diverts the water, then he would be liable, because that would be the direct result of his wrongfully withdrawing the support that is necessary and sufficient to support the surface.[3]

Obstruction of watercourse.

(2831) The court instructs the jury that plaintiff cannot recover in this action, unless they believe from the evidence that there was at the time mentioned in plaintiff's petition an underground flow of water so well defined as to be a continuous stream, and that defendant obstructed the channel of said underground stream of water, and thereby caused the water from said well defined underground flow of water to back up on plaintiff's land and thereby injured the plaintiff.[4]

Liability for casting refuse matter into river.

(2832) The court instructs the jury that, if they believe from the evidence that the defendant (threw or cast into the ——— river, or deposited upon the ice, edgings, saw dust, slabs, butts, hearts, clippings or other waste stuff from his mills, leaving them to be floated away by the water of the river without any care or oversight; and if any of such stuff was carried by the action of the water of the river on the plaintiff's land, and there deposited and left,) and the plaintiff was thereby injured; he may recover damages of defendant.[5]

(2833) And the court further instructs the jury that the

[3] Kistler v. Thompson, 158 Pa. 139.

[4] St. Louis Trust Co. v. Bambrick, 149 Mo. 560. Instruction set out in opinion and case reversed on erroneous instruction as to damages.

[5] Washburn v. Gilman, 64 Me. 163.

defendant is liable only for the damages occasioned by the stuff which came from his mills to and upon the plaintiff's land, and there remained; if it was mixed with like waste and stuff from other mills or places, and these together caused the injury; they must apportion the actual damage, and charge the defendant only with the amount of damage they are satisfied was caused by the stuff from his mills. They must not charge him for injury not found to have been occasioned by defendant's stuff.[6]

CHAPTER CXXVIII.

WILLS.

Essentials of valid will, 2834.
Same—Who may make, 2835.
Terms cannot be varied, 2836.
Same—Title of devisee; verbal declarations, 2837.
Sound mind—Definition, 2838-2845.
Tests of sound mind, 2846-2850.
Same—Capacity to contract or do business, 2851-2853.
Same—Unjust or unnatural wills, 2854, 2855.
Same—Who are natural objects of bounty, 2856.
Insane prejudice, 2857.
Impaired mind but sufficient understanding left, 2858, 2859.
Delirium or acute disease of mind, 2860-2862.
Sanity—Presumptions and burden of proof, 2863-2866.
Evidence of facts subsequent to execution, 2867-2869.
Same—Expert testimony, 2870.
Set of instructions on testamentary capacity, 2871-2877.
For contestants, 2878, 2879.
For proponents, 2880-2883.
Undue influence—What is, 2884, 2885.
Same—Confidential relations, 2886.
Same—How effected, 2887.
Same—Not exercised by all beneficiaries, 2888.
Same—Evidence, presumptions, burden of proof, 2889, 2890.
Same—Susceptibility by reason of age or weakness, 2891-2893.
Execution, 2894.

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[6] Washburn v. Gilman, 64 Me. 163.

Attestation clause as evidence, 2895.
Same—Presence, seeing the signing, 2896.
Same—Proof by other than attesting witnesses, 2897.
Burden of proof on entire case, 2898.

Essentials of valid will.

(2834) The court instructs the jury that in this state it is provided by statute that any person of full age and sound mind may execute a will, which, to be valid, must be in writing, witnessed by two competent witnesses, and signed by the testator, or by some person in his presence and by his express direction.[1]

Same—Who may make.

(2835) The court instructs the jury that persons of full age and sound mind may make a valid will.[2]

Terms cannot be varied.

(2836) The court instructs the jury that the will of C. read in evidence was the last, best and only evidence of his intentions as to the final disposition of his property; and all declarations of said C. and promises of Martha C., made to him to carry out his wishes with respect to said property devised here by said C. in his said will, are not to be considered by the jury.[3]

Same—Title of devisee; verbal declarations.

(2837) The court instructs the jury that Martha C. acquired by the will of Minatree C. the absolute title to all property devised to her thereby, and had full power to dispose of the same as she pleased and to whom she pleased, and the said right is not affected by anything the said Minatree C. may have said in regard to his said will either before or after its execution; and the jury will disregard all evidence tending to show what said Minatree C. said

[1] Approved in Matter of Will of Convey, 52 Iowa, 197.
[2] Approved in Bates v. Bates, 27 Ia. 110.
[3] Approved in McFadin v. Catron, 120 Mo. 252.

in reference to said will or to making it, or as to his desire as to what she should do with the property.[4]

Sound mind—Definition.

(2838) The court instructs the jury that, aside from the requisite formalities in the making of a will, the law defines the requisite soundness or mental capacity of the testator in this wise: a will is not valid, unless the testator not only intends of his own free will to make such a disposition, but is capable of knowing what he is doing and of understanding to whom he gives his property, and in what proportions, and whom he is depriving of it as heirs or as devisees under the will he makes.[5]

(2839) The court instructs the jury that, if a testator has mind enough to know and appreciate his relations to the natural objects of his bounty, and the character and effect of the disposition of his will, then he has a mind sufficiently sound to enable him to make a valid will.[6]

(2840) The court instructs the jury that the term "sound mind" in the statute does not mean that the testator shall have the same command of his mental faculties that he may have when in health. The law, recognizing that wills are often made in extremis, when the bodily powers are broken and the mental faculties are enfeebled, only requires that the testator shall retain so much of his mental power as will enable him to understand his relations to those who would be the natural objects of his bounty, and the property he wished to distribute, and the manner in which he intends to distribute it.[7]

(2841) The court instructs the jury that the law requires that a person, in order to make a valid will, should be of sound and disposing mind and memory. What we mean by

[4] Approved in McFadin v. Catron, 120 Mo. 252.
[5] Approved in McGinnis v. Kempsey, 27 Mich. 363.
[6] Approved in McGinnis v. Kempsey, 27 Mich. 363.
[7] Approved in McGinnis v. Kempsey, 27 Mich. 363.

soundness in this connection is not that the mind should be in its full vigor and power, but that its faculties, its machinery, should be in working order—so to speak—with an active power to collect and retain the elements of the business to be performed—for a sufficient time to perceive their obvious relation to each other.[8]

(2842) The court instructs the jury that the capacity required to render a man mentally competent to make a will, exists when the testator has will, mind and memory to sufficiently understand that he is selecting the person or persons whom he wishes to have his property, and to know his property, and the natural objects of his bounty, and his duties to them and to the persons upon whom his property is bestowed by the testamentary paper which he signs, and to make such disposition in accordance with a well settled purpose of his own.[9]

(2843) The court instructs the jury that they will find the paper offered as the last will and testament of H. to be his last will and testament, unless they believe from the evidence that when he executed said paper he had not mind and memory enough to understand that he was selecting the persons whom he wished to have his property, and to know his property, the natural objects of his bounty, and his duty to them; in which event, they will find said paper not to be his last will and testament.[10]

(2844) The court instructs the jury that, in order to a making of a valid will it is necessary that the decedent should be of sound mind at the time of the making of the will; that is, he was capable of comprehending his property interests and determining what disposition he desired to make of them, and of making such disposition. And by this it is not meant that he should possess the intellectual vigor of youth, or that

[8] Approved in McGinnis v. Kempsey, 27 Mich. 363.
[9] Approved in Bramel v. Bramel, 19 Ky. Law Rep. 46.
[10] Approved in Howat v. Howat, 19 Ky. Law Rep. 756.

usually enjoyed by him while in perfect health. It is enough, that as above stated, that he was capable of comprehending his property interests of which he was possessed, and of determining what disposition he desired to make of such property, and of making such disposition.[11]

(2845) The court instructs the jury that from these considerations you will perceive that the testator must have intended of his own free will to make such a disposition of his property as is made by his will, and must have been capable of knowing what he was doing, of understanding to whom he was giving his property and in what proportions, and whom he was cutting off from it as heirs who would otherwise have inherited his estate; and was also capable of understanding the reasons for giving or withholding his bounty as to any of them. In short, the testator, at the time of making the will, must have been capable of exercising his judgment, his reasoning faculties and a consecutive continuation of thought.[12]

Tests of sound mind.

(2846) The court instructs the jury that from these considerations you will perceive that the testator must have intended of his own free will to make such a disposition of his property as is made by his will, and must have been capable of knowing what he was doing, and of understanding to whom he was giving his property and in what proportions, and whom he was cutting off from it as heirs who would otherwise have inherited his estate; and was also capable of understanding the reasons for giving or withholding his bounty as to any of them. In short, the testator at the time of making the will, must have been capable of exercising his judgment, his reasoning faculties and a consecutive continuation of thought.[13]

[11] Approved in Webber v. Sullivan, 58 Iowa, 260.
[12] Approved in McGinnis v. Kempsey, 27 Mich. 363.
[13] Approved in McGinnis v. Kempsey, 27 Mich. 363.

(2847) The court instructs the jury that the law regards certain degrees or conditions of the mind, as materially affecting the validity of a will, much less than absolute imbecility or incompetency.[14]

(2848) The court instructs the jury that testamentary incapacity does not necessarily require that a person shall actually be insane or of an unsound mind. Weakness of intellect, whether it arises from extreme old age, or from disease, or great bodily infirmities, or suffering, or from all these combined, may render the testator incapable of making a valid will, providing such weakness really disqualifies her from knowing or appreciating the natural effects or consequences of the act she is engaged in. Eccentricities, peculiarities, oddities or the like, or weakness of mind ordinarily attendant upon old age, do not of themselves necessarily establish a lack of testamentary capacity.[15]

(2849) The court instructs the jury that a party competent to make a valid will, should possess a mind capable of exercising judgment, reason and deliberation—a mind capable of weighing the consequences of his will and its effects to a certain degree upon his estate and family; and all persons devoid of such reason are incompetent to make a valid will.[16]

(2850) The court instructs the jury that, in determining the issues of facts submitted to you under the instructions herein, you should carefully look to all the evidence in this case; and in so doing, you should take into consideration the physical condition of ———, arising from her age, sickness or any other cause; the condition of her mind at and before the time of the execution of the will in controversy; the execution of the will and its contents; the execution of any former wills by her and the provisions thereof; the re-

[14] Approved in Bates v. Bates, 27 Iowa, 110.
[15] Approved in Manatt v. Scott, 76 N. W. 717.
[16] Approved in Bates v. Bates, 27 Iowa, 110.

lations existing between her and the parties respectively herein, at and before the execution of the will in controversy; her family and connections; the terms upon which she stood with them; the claims of particular individuals; the condition and relative situation of the legatees and devisees named in the will; the situation of the testatrix herself and the circumstances under which the will was made; and in brief, every fact or circumstance which tends to throw any light upon the question submitted to you.[17]

Same—Capacity to contract or do business.

(2851) A person of sound mind, within the meaning of the law in this case, is one who has full, intelligent knowledge of the act he is engaged in, and full knowledge of the property he possesses, an intelligent perception and understanding of the disposition he desires to make of it, and of the persons he desires shall be the recipients of his bounty, and the capacity to recollect and comprehend the nature of the claims of those who are excluded from participating in his bounty; but it is not necessary that he should have capacity to make contracts, and do business generally, nor to engage in complex and intricate business matters.[18]

(2852) The court instructs the jury that the soundness of mind referred to in the instructions, is not necessarily such strength of mind as will enable a man to fairly contract with another at arm's length, or of trafficking in property and managing it advantageously.[19]

(2853) The court instructs the jury that a person of sound mind or memory, within the meaning of the law, is one who has full knowledge of the act she is engaged in and of the property she possesses, an intelligent understanding of the disposition she desires to make of it, and of the persons she desires shall receive her property, and the capacity to

[17] Approved in Hudson v. Hughan, 56 Kan. 152.

[18] Approved in Meeker v. Meeker (Iowa) 37 N. W. 773.

[19] Approved in Bramel v. Bramel, 19 Ky. Law Rep. 46.

recollect and apprehend the nature of the claims of those who are excluded from participating in her bounty. It is not necessary that she should have sufficient capacity to make contracts to do business generally, or to engage in complex and intricate business matters; and if the jury believe from the testimony in this case, that at the time of making the will in controversy, the deceased, ———, had such a knowledge as above defined, and possessed such understanding of the disposition she desired to make of her property and of the persons she desired to receive the same, and had capacity to recollect and apprehend the nature of the claims of those who were excluded from participating in her bounty; then she would be of sound mind and memory within the mind of the law, even though the jury may believe from the testimony that she was physically weak, and did not have the mental capacity sufficient to make contracts to do business generally, or to engage in complex and intricate business matters. But if, on the other hand, you find by a preponderance of the evidence that at the time of making the will in controversy, the deceased, ———, had any such knowledge as above defined in this instruction, and did not possess such understanding as to the disposition she desired to make of her property and of the persons she desired to receive the same; and did not have capacity to recollect and apprehend the nature of the claims of those who were excluded from participating in her bounty; then she would not be of sound mind and memory within the meaning of the law.[20]

Same—Unjust or unnatural wills.

(2854) The court instructs the jury that, if the jury should be satisfied that though the testator's mental powers had become enfeebled through mental decay or disease, he still had disposing mind; and if you find the evidence suffi-

[20] Approved in Hudson v. Hughan, 56 Kan. 152.

cient to show that he fully understood and intended to make the disposition which he has made of his property; then the will must stand, as touching the question of mental capacity or soundness, however unnatural or unjust its provisions may appear. Such are the tests the law prescribes for the guidance of courts and juries.[21]

(2855) The court instructs the jury that, in determining the question of mental capacity, a wide range is always permitted. The jury may look at the provisions of the will; may consider the history and relations of testator, his previous conduct and anything in relation to those related to or acquainted with him, and his previous determination as expressed by him as to what disposition he intended to make of his property, as well as the testimony of witnesses who swear to his actual mental condition as witnessed by them at the time of executing the will. If a party makes a will contrary to natural justice, this with other facts may be considered. But the mere fact that a will is not exactly according to what our own conception of justice would be, is not, of itself, sufficient to invalidate a will, for the reason that sane men are known to disagree in this respect. By "natural justice" we mean that which is founded in equity, in honesty and right. Natural justice requires that the parent shall care for his child. By bringing them into the world, the parent engages to provide for them. Natural justice requires that the child, who has been protected in the weakness of his infancy, should protect and support that parent in the infirmity of his age. There are other relations in the history of every individual out of which obligations occur, but which are so varied, and embrace so wide a range, that human tribunals cannot and do not attempt to enforce them. And wherever the question is presented as to whether a natural

[21] Approved in McGinnis v. Kempsey, 27 Mich. 363.

obligation has been created, it can only be by inquiring what honor or conscience dictates. But in determining a case like this,—what conscience dictates,—we are not to consider alone the fact that this person or that person is a blood relation of the testator. Even under the civil law, where a parent was not allowed to disinherit his child without giving his reasons therefor, the law recognized 14 reasons, either one of which was deemed sufficient to absolve the parent from what, without such reason, would be deemed an obligation founded on natural justice; in short, the conduct of the child towards the parent was to be considered in determining the question as to whether natural justice required the parent to confer any portion of his property upon the child. Did the child refuse to aid the father by giving him his services, and did he refuse to reverence his authority, natural justice did not require the father to treat the child, in the disposition of his property, any different from strangers.[22]

Same—Who are natural objects of bounty.

(2856) The court instructs the jury, for the defendants, that the natural objects of a testator's bounty are those persons, who, by reason of kinship or ties of gratitude, may reasonably be supposed to have some claim upon him; that no one, however near related he may be, has any natural right that can be asserted against the will of the testator. So in this case the mere fact—if it be a fact—that J. C. was son-in-law of W. B., did not, of itself, entitle him to be regarded as a natural object of the bounty of W. B.; and although the jury may believe from the evidence that W. B. was prejudiced against J. C., yet, unless they further believe from the evidence that J. C. had so conducted himself as to be entitled to the gratitude of his father-in-law, and to be regarded as a natural object of his bounty, such prejudice,

[22] Approved in McGinnis v. Kempsey, 27 Mich. 363.

although morbid and amounting to an insane delusion, would not in itself invalidate his will; providing such insane delusion did not prevent the testator, W. B., from understanding and appreciating his relation to those who had a claim upon his bounty, and who were the natural objects of his bounty.[23]

Insane prejudice.

(2857) The court instructs the jury that, if they should believe from the evidence that W. B. was capable of transacting ordinary business, where there was no intricacy about it or complication; yet if the jury further believe from the evidence that he was laboring under partial insanity from the time that he was adjudged insane down to the time of his death, and that he entertained an insane prejudice against J. C., which entered into and influenced him in the disposition of his property so far as A. C. was concerned; then the jury should find that the paper read in evidence is not the will of W. B., and that he was not of sound mind and disposing memory at the time of the execution of said paper.[24]

Impaired mind but sufficient understanding left.

(2858) Upon this question I advise you as requested by proponent's counsel that, even if the jury are satisfied that the mental powers of ——— had become enfeebled or disturbed by disease at the time he made the alleged will; still, if they find from the evidence that he did fully understand and intend to make the disposition which he made of his property; then the will must stand, as touching the question of mental soundness or capacity.[25]

(2859) The court charges that if the jury be satisfied from the evidence that at the time when A. B. made the al-

[23] Approved in Brace v. Black, 125 Ill. 33.
[24] Approved in Brace v. Black, 125 Ill. 33.
[25] Approved in McGinnis v. Kempsey, 27 Mich. 363.

leged will in question he was weakened in mind and was affected with a disease which was still further destroying his sanity; yet before you can say that he was not mentally competent to execute a will you must be satisfied that the impairment of mind had so far progressed that A. B. did not understand and intend the nature of the disposition of property made in such will.[26]

Delirium or acute disease of mind.

(2860) The court instructs the jury that, if in the present case you should find from the evidence that P., on the day he made the alleged will, was delirious or that his mental faculties were otherwise obscured by the disease from which he was suffering;—still, this would not necessarily prevent his having sufficient capacity to make a will. Delirium or obscuration of the mental faculties by disease must be so complete and so becloud the mind, that the testator does not understand the nature of the business in which he is engaged, or does not understand at the time of making the instrument, substantially the act, the extent of his property, his relations to others, who might or ought to be the objects of his bounty, and the scope and bearing of the provisions of the will, and does not possess the other qualifications to which I have already referred.[27]

(2861) The court instructs the jury that the impairing of the mental faculties by the effects of acute disease, such as delirium, or the enfeebling of them from any of the causes incident to such disease, must be to that extent which deprives him of the use of his reason and understanding to the extent already intimated; for, if this is not the testator's situation, although his understanding may be to some extent obscured, and his memory troubled, yet he may make his will.[28]

[26] Approved in McGinnis v. Kempsey, 27 Mich. 363.
[27] Approved in McGinnis v. Kempsey, 27 Mich. 363.
[28] Approved in McGinnis v. Kempsey, 27 Mich. 363.

(2862) The court instructs the jury that there is an essential difference between the apparently lucid intervals in delirium, and in general insanity. In delirium, the apparent return to reason may be real and unquestionable, while those which seem to occur in insanity are delusive, the patient being as really laboring under the powers of the malady, as in the more distinctly marked periods of its progress; but testamentary incapacity does not necessarily presuppose the existence of insanity, in its technical sense. Weakness of intellect, whether arising from extreme old age, from disease or great bodily infirmity, from intemperance, or from all these causes combined, and when such weakness disqualifies the testator from knowing or appreciating the nature and effect of consequences of the act he is engaged in, renders such testator incapable of making a valid will.[29]

Sanity—Presumptions and burden of proof.

(2863) The court instructs the jury that the legal presumption is in favor of sanity; and on the issue of sanity or insanity, the burden is upon him who asserts insanity to prove it. Hence, in a doubtful case, unless there appears a preponderance of proof of mental unsoundness, the issue shall be found the other way, and in favor of the execution of the will.[30]

(2864) The court instructs the jury that a legal presumption arises by law in favor of the sanity of all men, and although this presumption is not conclusive, still, the jury should consider it in hearing the evidence in the case, of which for particular purposes it forms a part.[31]

(2865) The court instructs the jury that, if they believe from all the evidence that said instrument of writing is consistent in its provisions and rational on its face, the pre-

[29] Approved in McGinnis v. Kempsey, 27 Mich. 363.
[30] Approved in Stephenson v. Stephenson, 62 Ia. 163.
[31] Approved in McGinnis v. Kempsey, 27 Mich. 363.

sumption is that said B. was of sound mind at the time of the execution, and the burden shifts to contestants to show that he was not of sound mind at that time.[32]

(2866) The court instructs the jury that there is a legal presumption raised by the law in favor of the sanity of all men, and although this presumption is not conclusive, still, the jury should consider it in weighing the evidence in the case, of which for practical purposes it forms a part.[33]

Evidence of facts subsequent to execution.

(2867) The court instructs the jury that, if you find that the will was valid at the time of its execution, it remained valid and is valid now, unless it has been revoked, which is not claimed by the contestant. The condition of the mind of the testator, or any undue influence exercised over him after the execution of the will, could not invalidate it, and no such claim is made in this case. The law permits, however, the facts and circumstances occurring after the execution of the will to be shown, relating to the condition of the testator's mind, and the question of fraud and undue influence claimed to have been exercised over him, for the purpose of proving by inference or otherwise that the same conditions existed before and at the time of the execution of the will, as existed afterwards on these points.[34]

(2868) The court instructs the jury that a will proved or admitted to have been executed and attested, as prescribed by law, will be presumed to have been made by a person of sound mind; but, if testimony is shown which counterbalances that presumption, the party seeking to support such will must establish by affirmative evidence that the testator was of sound mind when he executed the will.[35]

[32] Approved in Bramel v. Bramel, 19 Ky. Law Rep. 46.
[33] Approved in McGinnis v. Kempsey, 27 Mich. 36
[34] Approved in Haines v. Hayden, 95 Mich. 332.
[35] Approved in Bates v. Bates, 27 Ia. 110

(2869) The court instructs the jury that, if the jury believe from all the evidence that such instrument of writing is consistent in its provisions and rational on its face, the presumption is that said ——— was of sound mind at the time of its execution, and the burden shifts to contestants to show that he was not of sound mind at that time.[36]

Same—Expert testimony.

(2870) The court instructs the jury that the testimony of medical men of experience in their profession in this class of cases, after careful examination of the testator's mental condition, touching the mental condition of the deceased at the time of the execution of the will in question, may be by you given more weight and consideration than the testimony of non-professional witnesses.[37]

Set of instructions on testamentary capacity.

(2871) Gentlemen of the jury: you are called upon in this case to determine whether ———, on the ——— day of ———, 19—, possessed sufficient mental capacity to make a will.[38]

(2872) A paper has been offered in evidence, which the proponents claim to be his last will and testament. If you believe the testimony of the subscribing witnesses, the paper was executed in accordance with the laws of this state; but, conceding this to be true, it is claimed on behalf of the contestants that the paper is void, because ——— at the time of its execution did not possess sufficient mental vigor or capacity to comprehend and realize what he was doing. This is the question of fact, or the principal question of fact you must determine from the evidence that has been admitted. You must be careful, gentlemen of the jury, to confine your attention to the evidence introduced, and

[36] Approved in Bramel v. Bramel, 39 S. W. 520.
[37] Approved in Blake v. Rourke, 74 Iowa, 519.
[38] Fraser v. Jennison, 42 Mich. 576, 3 N. W. Rep. 882.

not permit your minds to be influenced by any statements made in your presence or hearing by the counsel in this case as to matters that were not permitted to go in evidence.[39]

(2873) The rule, gentlemen, stated by the weight of authority, undoubtedly is, that a less degree of mind is required to execute a will than a contract. Although the testator must understand, substantially, the nature of the act, the extent of his property, his relations to others who may or ought to be the object of his bounty, and the scope and bearing of the provisions of his will; and must have sufficiently active memory to collect in his mind, without prompting, the elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment in reference to them; yet, he need not have the same perfect and complete understanding and appreciation of any of these matters in all their bearings, as a person in sound and vigorous health of body and mind would have; nor is he required to know the precise legal effect of every provision contained in his will.[40]

(2874) To use still another form of expression, gentlemen, the will is not valid unless the person making it not only intends, of his own free will, to make such a disposition, but has capacity to know what he is doing, or understanding to whom he is giving his property, in what proportions, and who he is depriving of it, as his heirs or devisees under the will he makes. When a man has mind enough to know and appreciate the natural object of his bounty, and the character and effect of the disposition of the will, then he has mind sufficiently sound to enable him to make a valid will.[41]

[39] Fraser v. Jennison, 42 Mich. 576, 3 N. W. Rep. 882.
[40] Fraser v. Jennison, 42 Mich. 576, 3 N. W. Rep. 882.
[41] Fraser v. Jennison, 42 Mich. 576, 3 N. W. Rep. 882.

(2875) With these instructions in your mind, weigh the testimony of all the witnesses. Many of these were persons who spoke from actual knowledge of the deceased. Consider the testimony of those, as well as that of the experts, and give to each and every one of them such weight as you may deem proper. This question of capacity is entirely and exclusively for your disposition and decision.[42]

(2876) It rests upon the proponents to satisfy you, by a preponderance of proofs, that the deceased was of sound mind when the paper was executed. As bearing upon the state of ———'s mind, his declarations—that is, what he said to persons—have been admitted, and are to be construed by you for this purpose only, not as proving any facts stated in the declaration.[43]

(2877) If, under these instructions, you reach the conclusion that ——— possessed sufficient mental capacity on the ——— day of ———, 19—, to make his will, your verdict should be for the proponents. If, on the other hand, you determine he did not possess this mental capacity, your verdict should be for the contestants.[44]

For contestants.

(2878) If the jury believe from the evidence that, although ——— had sufficient capacity to attend to the ordinary business affairs of life; yet that, with regard to subjects connected with the testamentary disposition and distribution of his property and the natural objects of his bounty, he was insane; and that while laboring under such insanity he made the will in question; and that in making it he was so far influenced or controlled by such insanity as to be unable, rationally, to comprehend the nature and effect of the provisions of the will, and was thereby led to make

[42] Fraser v. Jennison, 42 Mich. 576, 3 N. W. Rep. 882.
[43] Fraser v. Jennison, 42 Mich. 576, 3 N. W. Rep. 882.
[44] Fraser v. Jennison, 42 Mich. 576, 3 N. W. Rep. 882.

the will as he did; then the jury must find the will not to be the will of the said ———.[45]

(2879) An insane delusion is a fixed and settled belief in facts, not existing, which no rational person would believe; such delusion may sometimes exist as to one or more subjects; and if the jury believe from the evidence in this case that ——— was laboring under such insane delusions upon subjects connected with the testamentary disposition of his property, and the natural objects of his bounty, when he made the will in question, and was thereby rendered incompetent to comprehend, rationally, the nature and effects of the act, and that but for such delusions he would not have made the will as he did; then the jury should find against the validity of the will.[46]

For proponents.

(2880) The court instructs the jury that, if they believe from the evidence that ———, at the time he signed the paper in dispute, had mind and memory sufficient to transact his ordinary business; and that, when he made the will, he knew and understood the business he was engaged in; then the jury should find said paper writing to be the will of said ———.[47]

(2881) The court instructs the jury that the owner of property who has capacity to attend to his ordinary business, has the lawful right to dispose of it, either by deed or by will, as he may choose, and it requires no greater mental capacity to make a valid will than to make a valid deed. And if such an owner chooses to disinherit his heir, or leave his property to some charitable object, he has a legal right to do so, and such disposition of his property is valid, whether it be reasonable or unreasonable, just or unjust; and the reasonableness or justice or propriety of the will are

[45] American Bible Soc. v. Price, 115 Ill. 623.
[46] American Bible Soc. v. Price, 115 Ill. 623.
[47] American Bible Soc. v. Price, 115 Ill. 623.

not questions for the jury to pass upon. If, therefore, the jury believe from the evidence that when he executed the paper in dispute, ——— had capacity enough to attend to his ordinary business, and to know and understand the business he was engaged in, then he had the right and the capacity to make such a will; and the jury should find the paper in dispute to be the will of said ———. The court instructs the jury that, even if they find from the evidence that ——— had, during some portion of his life, eccentricities or peculiarities, or even an insane delusion or partial insanity on the subject of religion, or masonry, or education, or any other subject; yet, if they find from the evidence that, at the time he made the will in question, he had sufficient mind and memory to understand his ordinary business, and that he knew and understood the business he was engaged in, and intended to make such a will; the jury should find such will to be the will of said ———.[48]

(2882) The court instructs the jury that eccentricities or peculiarities, or radical or extreme notions or opinions upon religion, colleges, education, or masonry and secret societies, will not necessarily render a man incapable of making a will; and if the jury find that, in making the will in dispute, ——— had sufficient mind and memory to understand the business he was engaged in when he made the will; then the jury should find in favor of said will, though said ——— may have had eccentricities and peculiarities, or extreme notions and opinions upon religion, colleges, education, or masonry, or secret societies.[49]

(2883) The court instructs the jury that, in order to make a valid will, it is only necessary that a man shall have mental capacity sufficient for the transaction of the ordinary affairs of life; and possessing this, though he may be feeble

[48] American Bible Soc. v. Price, 115 Ill. 623.
[49] American Bible Soc. v. Price, 115 Ill. 623.

in mind and body from sickness or old age, he has the legal right to dispose of his property just as he pleases, without consulting either his family or his acquaintances. And if the jury believe from the evidence that when he executed the paper in dispute, ——— knew what he was doing, and executed it as his will, understanding its nature and effect; and that, at the time, he had sufficient mind and memory to transact his ordinary business, such as buying or selling, or renting property, or collecting or paying out money, or settling accounts; then the jury should find the paper in dispute to be the last will and testament of said ———.[50]

Undue influence—What is.

(2884) The court instructs the jury that "undue influence" is any means employed upon and with the testator which, under the circumstances and conditions by which the testator was surrounded, he could not well resist, and which controlled his volition and induced him to do what otherwise would not have been done.[51]

(2885) The court instructs the jury that to make a good will a man must be a free agent, but all influences are not unlawful; appeals to the affections or ties of kindred, to gratitude for past services, or pity for future destitution, or the like, are all legitimate, and may be fairly urged on a testator. On the other hand pressure of whatever character, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity which the testator has not the will or strength to resist, and to which he yields for peace and quiet, if carried to a degree in which the testator's judgment, discretion, or wish is overborne, will constitute undue influence, though no force is used or threat-

[50] American Bible Soc. v. Price, 115 Ill. 623.

[51] Chappell v. Trent, 90 Va. 849.

ened. In other words, his will must be the offspring of his own volition, and not the record of the wishes and desires of some one else; and in considering whether the testator's free volition had been overborne or controlled, the jury must consider his age, his physical and mental condition, and all the circumstances surrounding the testator.[52]

Same—Confidential relations.

(2886) The court instructs the jury that, if they believe from the evidence that W. E. W. was the son of the testator, W. C. W., that at the time of the making of the paper purported to be his will, and for several years prior thereto, he sustained confidential and fiduciary relations towards his father; and that he resided with his father until death; managed and controlled his business affairs; had the close and implicit confidence of his father; that his father looked to him for advice, counsel, and direction; was controlled by him and his judgment over and above his own on business matters; and that he is the largest beneficiary in said will; and further find that the will in controversy is a result of such influence or control of the said W. E. W. and not the free, voluntary, and deliberate offspring of his own mind; they will find that the writing or will in controversy is not the will of said W. C. W.[53]

Same—How effected.

(2887) The court instructs the jury that whether the free agency of the testator is destroyed or mastered by physical force or mental coercion, by threats which occasion fear, or by importunity which the testator is too weak to resist, or which extorts compliance in the hope of peace, is immaterial. In considering the question, therefore, it is essential to ascertain, so far as practicable, the power of coercion upon the one hand, and the liability of its influence on the

[52] West v. West, 144 Mo. 119.

[53] Approved in West v. West, 144 Mo. 119.

other. And wherever, through weakness, ignorance, dependence, or implicit reliance of one on the good faith of another, the latter obtains ascendancy which prevents the former from exercising an unbiased judgment, undue influence exists.[54]

Same—Not exercised by all beneficiaries.

(2888) The court instructs the jury that it is not necessary that there should be confidential relations between all the beneficiaries and the testator. If there is such a relation with one of the family, and the will is found to have been procured through his undue influence, it operates against all the family.[55]

Same—Evidence, presumptions, burden of proof.

(2889) The court instructs the jury that, if a testator is given a false impression concerning persons who are the natural objects of the bounty, so that when he comes to make his will he acts upon unfounded beliefs and gives or withholds his bounty in a manner entirely different from what his action would have been had it not been based on false beliefs and opinions deliberately instilled into his mind for the purpose of influencing his will; and if in such case the testator is not in position, from any cause, as sickness, age, debility, and concealment of the true facts, or other reason, to judge for himself, and to deliberate or resist the influence, and the will is a result of them, it is invalid from undue influence. (1) While the burden of proving the will to be the produce of undue influence rests upon those alleging it; and though, when the testator is shown to have been of sound mind, there is no presumption of undue influence from the mere fact that the will is unreasonable and unjust, and that there was interest and opportunity to make use of undue influence; still, when the evidence shows certain relations be-

[54] Approved in Coghill v. Kennedy (Ala.) 24 So. 459.
[55] Approved in Coghill v. Kennedy (Ala.) 24 So. 459.

tween the testator and beneficiaries, well calculated to give them an undue influence over him, and that his condition of mind and body was such as to make it probable that he was not able to resist the influence of others; and that the provisions of the will are unnatural and unreasonable, and contrary to previously expressed intentions; and when the evidence further shows that the beneficiaries are strangers to the blood; that they had possession of the person of the testator, who was in a condition of weakness and sickness; that they were active in procuring the will; that they furnished instructions for the draftsman and appointed him, summoned witnesses, and were present at the execution in the absence and without the knowledge of the relatives; and that concealment was resorted to; and that the relatives and friends of the deceased were denied or excluded from his society, with the view of acquiring and maintaining influence over him;—the presumption of undue influence does arise, and it is incumbent upon the proponents to satisfy the jury that the will expresses free and intelligent wishes of the testator.[56]

(2890) The court instructs the jury that, if they believe from the evidence in this cause that there has been an unequal discrimination in the division of the property; and if they believe that the evidence in the cause further shows an undue influence of the said W. E. W. over the mind of the deceased father prior to, at the time of, and since the date of the proposed will; then it devolves upon the proponents to show by the preponderance of the evidence a reasonable cause for such discrimination, if any; and so believing, if the jury fails to find such reasonable and just cause for such discrimination, if any, they should find that the writing in question is not the will of W. C. W.[57]

[56] Approved in Coghill v. Kennedy (Ala.) 24 So. 459.

[57] Approved in West v. West, 144 Mo. 119.

Same—Susceptibility by reason of age or weakness.

(2891) The court instructs the jury that, in determining the question whether undue influence was used to procure the execution of the paper offered as the last will of W. C. W., they will take into consideration said W. C. W.'s age, mental and physical condition at the time of executing it, the will itself, and the provisions therein, together with all the other facts and circumstances shown by the evidence.[58]

(2892) The court instructs the jury that when the testatrix is aged, and has an impaired mind and memory; though such testatrix may not legally be incompetent to make a will, yet a will of such person ought not to be sustained, unless it appears that such disposition of property has been fairly made, to have emanated from a free will without the interposition of others, and to accord with intentions previously expressed or implied from family relations; and in this case, if you find from the evidence that the testatrix was over 70 years of age, with an impaired mind and memory; and although you may find she had sufficient mental capacity to make a will; yet, if you believe from the evidence that a disposition of property has been made which is unfair to her legal representatives; that such disposition did not emanate from a free will, and is not in accord with the testatrix's previous intentions, either express or implied, from the family relations; you will be justified in finding that it is not the voluntary and free will of the testatrix, and that such will was obtained by undue influence.[59]

(2893) The court instructs the jury that, when an old man eighty-five years old, of greatly impaired health and enfeebled mind, away from his next of kin and in the custody of persons of no kin, is induced to make a will, giving to such persons his entire estate, the law requires that such persons must clearly prove that the said will was the free and voluntary act

[58] Approved in West v. West, 144 Mo. 119.

[59] Approved in Matter of Will of Ames, 51 Iowa, 596.

of the testator, and an intelligent expression of his wishes respecting the disposition of his property.[60]

Execution.

(2894) The court instructs the jury that no will is valid unless in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature; and moreover, unless it be wholly written by the testator, the signature must be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the testator.[61]

Attestation clause as evidence.

(2895) The court instructs the jury that the attestation clause to the will is as follows: "The said will was signed, and at the request of the testator, we signed the same as witnesses in his presence and in the presence of each other." Now, if you find from the evidence that this attestation clause was read in the presence of the testator and the witnesses at the time they signed the same, and was understood by the testator,—this is sufficient presumptive proof, not only of publication, but also that the witnesses signed at his request.[62]

Same—Presence, seeing the signing.

(2896) The court instructs the jury that the statute does not require that the subscribing witnesses shall see the testator write his name to the will, but it is sufficient if he did in fact sign the will, provided he afterwards acknowledged it as his will, and requested them to sign as witnesses.[63]

[60] Will of Convey, 52 Iowa, 197.

[61] Will of Convey, 52 Iowa, 197. Follow requirements of statute of particular state.

[62] Approved in Matter of Will of Convey, 52 Iowa, 197.

[63] Approved in Matter of Will of Convey, 52 Iowa, 197.

Same—Proof by other than attesting witnesses.

(2897) The court instructs the jury that while the onus of showing a compliance with the statute (as above explained) devolves upon the party seeking to establish the will, yet, formal execution may be shown by persons other than the subscribing witnesses, or may be inferred from circumstances, as well as established by the direct and positive testimony of the attesting witnesses; and it is sufficient if the statute was substantially complied with.[64]

Burden of proof on entire case.

(2898) The court instructs the jury that it, therefore, devolves upon the proponent (that is, the party seeking to have the will established) to show by the evidence that at the time of the execution of the will or instrument in question of the testator, ———, was of sound mind; that he signed said instrument as and for his last will, and that such will was witnessed by two competent witnesses.[65]

CHAPTER CXXIX.

WITNESSES.

Credibility of witnesses, 2899-2903.
Manner of witness and probability of testimony, 2904-2907.
Right to disregard whole testimony of witness testifying falsely as to a material fact, 2908-2912.
Credibility of party to suit testifying as witness, 2913.

Credibility of witnesses.

(2899) The court instructs the jury that, in determining the weight to be given to the testimony of a witness, they will take into consideration the intelligence of the witness; the circumstances surrounding the witness at the time concerning which he testifies, his interest (if any) in the event of the

[64] Approved in Matter of Will of Convey, 52 Iowa, 197.
[65] Approved in Matter of Will of Convey, 52 Iowa, 197.

suit; his bias or prejudice (if any); his manner on the witness stand; his apparent fairness or want of fairness; the reasonableness of his testimony; his means of observation and knowledge; the character of his testimony, whether negative or affirmative; and all matters and facts and circumstances shown on the trial, bearing upon the question of the weight to be given to his testimony; and give to the testimony of each witness such weight as to you it may seem fairly entitled to.[1]

(2900) The court instructs that the jury may consider the interest of a party to the action as affecting his credibility as a witness.[2]

(2901) The court instructs the jury that, while the law permits the impeachment of a witness, by proving his general reputation for truth and veracity in the neighborhood where he resides to be bad; yet, if you believe that the plaintiff, while on the stand, gave a truthful, candid and honest statement of the facts and circumstances surrounding the transaction in question; then the jury should not disregard his testimony, but you should give it such faith and credit as in your opinion it is entitled to.[3]

(2902) The court instructs that the jury should consider the evidence of the witness on the former trial, and if they find contradictions, they may determine on which occasion the witness told the truth.[4]

(2903) The court instructs the jury that you are the judges of the credibility of each and every witness, and you should give the testimony of each and every witness such weight as, from all the facts and circumstances in proof before you in this case, you shall deem the same entitled to; it is your duty

[1] Chicago, B. & Q. R. Co. v. Pollock, 195 Ill. 156.

[2] Chicago & E. R. Co. v. Meech, 163 Ill. 305.

The word "should" may be substituted for the word "may" in the above instruction, but the form as given is preferable.

[3] Roy v. Goings, 112 Ill. 656.

[4] City of Huntingburg v. First, 53 N. E. 246.

if you can, to reconcile the testimony of the witnesses, if there be any disagreement between them; but, if you cannot, then you must determine, from all the evidence before you, which of the witnesses is entitled to the greater credit.[5]

Manner of witness and probability of testimony.

(2904) The court instructs the jury that they are the sole judges of the weight of the evidence and the credibility of the witnesses; and in determining the same you may consider the interest (if any) which any witness may have in the result of the trial, his manner upon the stand, and the probability or improbability of his testimony, in connection with all the facts and circumstances proven in the case. If you believe that any witness has willfully sworn falsely to any material fact in the case, you are at liberty to disregard the whole or any part of such witness' testimony.[6]

(2905) The court instructs the jury that the credibility of the witnesses who have appeared before the court at this trial is a matter for the jury to determine. Unless a statement of fact, by a witness, impresses you as true or worthy of your belief, you are not bound to accept such statement as proof of the fact so stated. You are authorized by law to reject any statement of any witness or witnesses that you may believe under all the evidence to be false or untrue, whether intentionally false or not.[7]

(2906) The court instructs the jury that, in considering this case, they should not indulge in any mere suppositions or imaginings as to what may or may not have been done or occurred at the time of the occurrence, but must decide the case upon the evidence of the witnesses and the instruction of the court. And the court further instructs the jury that they are the sole judges of the credibility of the witnesses and

[5] Approved in Albright v. Brown, 23 Neb. 136.

[6] Approved in Guinney v. Southern Electric R. Co., 25 Am. & Eng. Ry. Cas. (N. S.) 820.

[7] Approved in Chicago Title & Trust Co. v. Brady, 165 Mo. 197.

the weight to be given to their testimony; and in weighing the testimony, the jury should take into consideration, not only what they have testified to, but also their manner of testifying, and their bias (if any is shown) towards or against plaintiffs or defendant, their ability at the time to clearly see what occurred, and now to clearly recall and relate the facts; and if the jury believe from the evidence that any witness has knowingly sworn falsely to any material fact, then the jury may disbelieve the whole or any part of such witness' testimony.[8]

(2907) The court instructs the jury that the burden of proof is upon the plaintiff, as she must make out her case by a preponderance of the evidence; by preponderance of evidence is not meant the mere greater number of witnesses upon the one side or the other, but that evidence which is most convincing and satisfactory to the minds of the jurors. In determining upon which side the preponderance of the evidence is, the jury may take into consideration the opportunities of the several witnesses for seeing and knowing the things to which they testify, their conduct and demeanor while testifying, their interest (if any), or want of interest (if any) in the result of the suit, the probability or improbability of the truth of their several statements, in view of all the other evidence, and the facts and circumstances appearing upon the trial and from all the circumstances determine the weight or preponderance of the evidence. The jury are the sole judges of the weight of the evidence and the credibility of the witnesses.[9]

Right to disregard whole testimony of witness testifying falsely as to a material fact.

(2908) The court instructs the jury that, where a witness willfully testifies falsely to any fact material to the issues,

[8] Approved in Hogan v. Citizens' Ry. Co., 150 Mo. 36.
[9] Approved in Kansas City v. Bradbury, 45 Kan. 381.

you may disregard his testimony entirely, except in so far as it is corroborated by other credible evidence.[10]

(2909) The court instructs the jury that, if they believe from the evidence that any witness in this case has willfully and knowingly sworn falsely to any material fact in the case, then the jury have the right to disregard the entire testimony of the witness except in those matters (if any there be) in which the testimony of the witness, who has given the false testimony, is corroborated by other evidence which the jury may regard as credible, or by facts and circumstances appearing in the evidence.[11]

(2910) The court instructs the jury that, if they believe from the evidence that any witness has willfully and corruptly testified falsely concerning any material matter in dispute, they may disregard the whole or any portion of the evidence of such witness; there is no inflexible rule interposed between the witnesses and the jury requiring the jury to accept or reject all the testimony of any witness.[12]

(2911) You are instructed that the jury are the sole judges of the credibility of the several witnesses that have appeared before you, and of the weight or importance to be given to

[10] Alton Lime & Cement Co. v. Calvey, 47 Ill. App. 343; Hirschman v. People, 101 Ill. 568; Angelo v. Faul, 85 Ill. 106; McDavid v. Ellis, 78 Ill. App. 381; United States Exp. Co. v. Hutchins, 58 Ill. 44; Freeman v. Easly, 117 Ill. 317; Chicago & A. R. Co. v. Buttolf, 66 Ill. 347; Schanzenbach v. Brough, 58 Ill. App. 526; Swan v. People, 98 Ill. 610; Shove v. Rowe, 42 Ill. App. 150; Kerr v. Hodge, 39 Ill. App. 546; Pollard v. People, 69 Ill. 148; Linck v. Whipple, 31 Ill. App. 155; Smith v. Forbes, 14 Ill. App. 477; Goeing v. Outhouse, 95 Ill. 346; Yundt v. Hartrunft, 41 Ill. 9; Meixsell v. Williamson, 35 Ill. 529; Littlejohn v. Arbogast, 95 Ill. App. 605.

It is error to instruct the jury to disregard such evidence "unless corroborated by competent evidence." Schimmelfenig v. Donovan, 13 Ill. App. 47.

Or unless "corroborated by other credible witnesses." Steward v. West Chicago Street R. Co., 67 Ill. App. 496.

[11] West Chicago Street R. Co. v. Lieserowitz, 197 Ill. 607.

[12] Approved in Kansas City v. Bradbury, 45 Kan. 381.

their respective statements or testimony; and if you believe from all that you have seen or heard at the trial that any witness has wilfully sworn falsely to any of the facts mentioned in the instructions herein, as bearing on the plaintiff's alleged claim or defendant's alleged defense thereto, then you are at liberty to disregard entirely the testimony of said witness.[13]

(2912) The court instructs that the jury may disregard the entire testimony of a witness, when it is palpable that he has intentionally testified falsely as to some material matter, and is not corroborated by other credible evidence.[14]

Credibility of party to suit testifying as witness.

(2913) The court instructs the jury that, under our statute a party to an action may testify in his own behalf; but the same statute, allowing a party to testify, permits interest of the witness, a party, to be considered as affecting his credibility as a witness; and it is your duty, in considering the weight to be given to plaintiff's testimony, to consider the interest which he has in the result of this action. In weighing his testimony, you should also consider whether or not his statements are probable in view of all the circumstances of the case; whether or not his statements are consistent with each other; and whether or not they conflict with statements or declarations which he may have made at any previous time when in possession of his reason and mental faculties. If you should believe that plaintiff had testified falsely as to any material facts in the case, you would be authorized to reject all of his testimony, except such testimony as is corroborated by other credible evidence.[15]

[13] Approved in O'Connell v. St. Louis Cable & Western R. R. Co., 106 Mo. 482.

[14] North Chicago St. Ry. Co. v. Fitzgibbons, 180 Ill. 466.

The omission of the word "credible," or some equivalent word, in this instruction might be misleading.

[15] Brown v. C., R. I. & P. Co., 51 Iowa, 235.

CHAPTER CXXX.

WORK AND LABOR.

Amount of recovery, 2914-2916.

Amount of recovery.

(2914) The court instructs the jury that if you find from the evidence that the defendant's engineer or his assistant only made approximate estimates of the work as stated in the petition, such estimates would not limit the recovery of the plaintiffs to the amount of the work so approximately estimated. But, if you find the plaintiffs, not being in fault themselves, were prevented from performing the work by the default of the defendant in paying for the work which was in consequence suspended or abandoned, and that no final estimate was made of all the work done, then, and in that case, the plaintiffs can recover for the whole amount of work done by them, whether estimated or not.[1]

(2915) The court instructs the jury that, if you find from the evidence that plaintiff, in the completion of the building of the defendants, was required by the contract to procure both materials and labor, and that said materials and labor were to be furnished at the cost thereof; and that in addition to said cost of materials and labor the plaintiff was to be allowed fifteen per cent on the amount of said cost, to remunerate plaintiff for his services in superintending and managing said work; then, and in that event, you will be obliged to compute the actual cost of said materials and work, and after the amount is determined, you will add thereto fifteen per cent of said cost of materials and labor, and after allowing all credits to which he is entitled, render your verdict accordingly. If the amount of the estimated cost of materials and labor, and the fifteen per cent exceeds the payments

[1] Approved in Bean v. Miller, 69 Mo. 384.

made by defendant, you will find a verdict for plaintiff for said excess.[2]

(2916) The court instructs the jury that the plaintiff sues for a balance he alleges to be due him from the defendant for material and labor furnished by plaintiff in the completion of the building of the defendant. The defendant denies any indebtedness to plaintiff, and avers that instead of there being a balance due the plaintiff for the work and material, as claimed by plaintiff, the plaintiff was overpaid by the defendant, and he asks a return of the money so overpaid. The defendant claims also that said work and materials were also furnished by plaintiff at certain stipulated rates and prices, and that the amount claimed by plaintiff is in excess of the amount stipulated. Now, the court instructs the jury that, if you find from the evidence that the payments made by defendant exceed the amount of —, then you will find for the defendant the amount so overpaid. So, also, if you believe from the evidence that there was a contract made between the plaintiff and the defendant for the ———, and in said contract the plaintiff agreed and guaranteed that the cost of the ——— should not exceed the sum of —; then the plaintiff cannot recover for said work and materials more than the —.[3]

CHAPTER CXXXI.

CAUTIONARY INSTRUCTIONS.

Liability of employe to bias in employer's favor, 2917-2919.
Duty to disregard financial condition of parties, 2920.
Duty to disregard fact that defendant is a corporation, 2921-2923.
Expert and opinion testimony, 2924-2926.
Province of court and jury, 2927.

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[2] Approved in Maverick v. Maury, 79 Tex. 435.
[3] Approved in Maverick v. Maury, 79 Tex. 435.

Jury as judges of facts and credibility of witnesses, 2928, 2929.
Duty to look at evidence in common-sense light, 2930.
Necessity that case be made exclusively by testimony of prevailing party's witnesses, 2931.
Confining jury to evidence, 2932, 2933.
Duty to follow instructions, 2934.
With regard to exemplary damages, 2935.
Tests in presence of jury as evidence, 2936.

Liability of employe to bias in employer's favor.

(2917) The court instructs the jury that counsel for the plaintiff have properly called your attention to the fact that we have a statute making it a felony for a fireman or an engineer on a railroad train not to observe the regulations of the statute which has just been called to your attention. In other words if either of these engineers or firemen saw plaintiff as an obstruction on the road, and did not blow the whistle and do all that was necessary to stop the train, or if they failed to see him, they are guilty of a felony, and would be punishable under the statute for that crime. It is plain, therefore, that these witnesses were testifying in their own interest in respect to that criminal liability. It is also to be observed that they are in the employment of a railroad company, and have such bias in that regard as belongs to ordinary human nature. But I have told you, even in criminal cases, that if the jury can see that the witness, notwithstanding the gravity of his interest, is telling the truth, that they not only may, but should, believe and base their verdict accordingly.[1]

(2918) The court instructs the jury that, while they are the sole judges of the credibility of witnesses, they have no right to disregard the testimony of an unimpeached witness sworn on behalf of the defendant, simply because such witness is or was an employe of defendant. But the relation of

[1] Approved in Louisville & N. R. Co. v. McClish, 26 Am. & Eng. Ry. Cas. (N. S.) 942.

any witness to a party to the suit, such as employe, is a matter proper for the consideration of the jury in the light of all the evidence; and if, after such consideration, it does not appear that the testimony of the witness has been influenced by such relation, then it should be disregarded. What influence, if any, such relation may have had on the testimony of any witness, is to be estimated by the jury in the light of all the evidence.[2]

(2919) The court instructs the jury that, while they are the judges of the credibility of the witnesses, they have no right to disregard the testimony of an unimpeached witness sworn on behalf of the defendant, simply because such witness was or is an employee of the defendant; but it is the duty of the jury to receive the testimony of such witness in the light of all the evidence, the same as they would receive the testimony of any other witness, and to determine the credibility of such employee by the same principles and tests by which they would determine the credibility of any other witness.[3]

Duty to disregard financial condition of parties.

(2920) The court instructs the jury that it will be the duty of the jury, in arriving at a verdict in this case, to be governed by the evidence in the case, and the law as herein given you, regardless of the condition of the parties hereto financially, or of the effect of your verdict upon the parties, or either of them.[4]

Duty to disregard fact that defendant is a corporation.

(2921) The court instructs the jury that these actions for personal injuries are necessarily painful to the feelings and there is often an inclination, where the feelings are excited by

[2] Approved in Illinois Cent. R. Co. v. Haskins, 115 Ill. 300.

[3] Cicero & Proviso Street R. Co. v. Rollins, 195 Ill. 219. The addition to the above instruction of the words "in the employ of an individual litigant" was held in this case to be error.

[4] Approved in Wadsworth v. Walliker, 51 Iowa, 605.

the addresses of eloquent counsel, to give more perhaps than in your cooler moments you would undertake to give. You are to bear in mind that your oath calls for your decision according to the evidence and that extravagant verdicts have to be set aside and the case tried over again.[5]

(2922) The court instructs the jury that it is their duty to try this suit as fairly and impartially as though it were a suit between two private persons; and it is their duty to disregard all appeals made by counsel to them solely with a view of exciting their prejudice against the defendant because it is a railroad corporation, if any such have been made. That while counsel have a right to criticise the testimony of witnesses, they have no right to denounce the testimony of any witnesses as unworthy of credit, simply for the reason that such witnesses are or may have been in the employ of the defendant, in discharge of its business as a railroad corporation; and such appeals and denunciations, if any such have been made, should be entirely disregarded by the jury in arriving at a verdict in this case.[6]

(2923) The court instructs the jury that it is your sworn duty to try the case as though it were one between individuals, because the defendant is entitled to be treated precisely as an individual, and no inferences or presumptions are to be drawn or indulged against the defendant that would be improper in an action between two men.[7]

Expert and opinion testimony.

(2924) The court instructs the jury that you are the judges of the credibility of these witnesses, not only of the

[5] Approved in Connor v. Electric Traction Co., 173 Pa. 602.

[6] Approved in Illinois Cent. R. Co. v. Haskins, 115 Ill. 300. It was held not improper to qualify the instruction by a statement that the question of relation of employer and employe could be considered by the jury in the light of the evidence to determine credibility of witness.

[7] City of Indianapolis v. Gaston, 58 Ind. 224.

plaintiff and those representing the defendant, but also of the expert witnesses and of the witnesses who have testified. You are not bound by the testimony of expert witnesses, any more than by the testimony of any other witness. You should not disregard their testimony without cause; but you are the judges of the credibility of all the witnesses, including the experts who have been sworn.[8]

(2925) The court instructs the jury that you have heard the testimony of these physicians, who have given evidence upon that point and testified as experts, giving opinions. That class of testimony is proper and competent concerning matters involving special knowledge, or skill, or experience upon some subject which is not within the realm of the ordinary experience of mankind, and which requires special research and study to understand. The law allows those skilled in that special branch to express opinions, and upon a hypothetical state of facts stated to them, to say whether or not, according to their experience and research, a fact may or may not exist. But nevertheless, while their opinions are allowed to be given, it is entirely within the province of the jury to say what weight shall be given to them. Jurors are not bound by the testimony of experts. Their testimony is to be canvassed as that of any other witness. Just as far as their testimony appeals to your judgment, convincing you of its truth, you should adopt it; but the mere fact that witnesses are called as experts, and give opinions upon a particular point, does not necessarily obligate the jury to accept their opinions as to what the facts are, in the face of the testimony of witnesses claiming to have actual knowledge of the facts.[9]

(2926) The court instructs the jury that the defendant has introduced the testimony of witnesses showing themselves to be competent as experts, who have testified before the jury, giving their opinion on the case put to them,—whether the

[8] Approved in Olson v. Village of Manistique, 110 Mich. 656.
[9] Approved in Olson v. Village of Manistique, 110 Mich. 656.

injury was received by the cars knocking the deceased off the bridge, or by falling from one of the caps of the bridge. The court instructs the jury that it is their duty to consider such evidence just like the testimony of any other witness, and not to discard it simply because it is the evidence of experts or professional witnesses; and if the jury believe that the testimony of these experts and the evidence in the case sustain the correctness of the defendant's theory that the injury was caused by falling off the bridge, the plaintiff cannot recover, provided such falling off was not caused by the negligent acts of the defendant.[10]

Province of court and jury.

(2927) The court instructs the jury that neither by these instructions or the special interrogatories, nor by any words uttered or remark made by the court during this trial, does or did the court intimate or mean to give, or wish to be understood as giving, an opinion as to what the proof is or what it is not, or what the facts are in this case or what are not the facts therein. It is solely and exclusively for the jury to find and determine the facts, and this they must do from the evidence, and having done so, then apply to them the law as stated in these instructions. The instructions given to the jury are and constitute one connected body and series, and should be so regarded and treated by the jury; that is to say, they should apply them to the facts as a whole, and not detached or separated, any one instruction from any or either of the others.[11]

Jury as judges of facts and credibility of witnesses.

(2928) The court instructs the jury that you are the exclusive judges of the facts proven, the credibility of the witnesses, and the weight to be given to the testimony.[12]

[10] Approved in McMillan v. Burlington & M. R. Co., 46 Iowa, 231.

[11] Approved in North Chicago St. R. Co. v. Kaspers, 186 Ill. 246.

[12] Approved in Austin & N. W. Ry. Co. v. Anderson, 79 Tex. 427, and expressly commended.

(2929) The court instructs that, if the jury are satisfied that the testimony recited in the foregoing instruction is true, they can find for defendant; and if they are not satisfied that it is true, they will find such damages as they think proper.[13]

Duty to look at evidence in common sense light.

(2930) The court instructs the jury that you are to look at the evidence in this case in a common sense light, and to judge it by that experience and observation of human affairs of which you are possessed as individual members of society, and will endeavor to arrive at the truth as the evidence shows it to be. If the claim made by either party is unusual and unnatural, out of the ordinary course of affairs, you are not required to take the same for granted upon slight evidence; nor should you so find, except upon proof of a reliable character and which satisfies the mind.[14]

Necessity that case be made exclusively by testimony of prevailing party's witnesses.

(2931) The court instructs the jury that, if they believe from the evidence that defendant was guilty of negligence as charged in the declaration, then it makes no difference as to the responsibility of the defendant, whether such negligence appears and is proved by the testimony on the part of the plaintiff, or by the testimony of the defendant's own witnesses.[15]

Confining jury to evidence.

(2932) The court instructs the jury that you will not take into consideration any statement of counsel as to the issues which were before court on a former trial, but you will confine yourselves to the facts and evidence presented to you by this court and which are before you by its authority; in other

[13] Gately v. Campbell, 124 Cal. 520.
[14] Approved in State v. Geddis, 42 Iowa, 264.
[15] Keokuk Northern Line Packet Co. v. True, 88 Ill. 608.

words, all statements of fact made in argument by counsel not warranted by the testimony should be disregarded.[17]

(2933) The court instructs the jury that in coming to any conclusion in this case you should be governed by the evidence introduced before you, and by that alone; disregard entirely any remarks by counsel unwarranted by the evidence, if any such have been made.[18]

Duty to follow instructions.

(2934) The court instructs the jury that you have taken a solemn oath to try this case according to the law and evidence given you in open court, and you have no authority to consider or be controlled by anything else than given you as law by the court; and unless your verdict accords with the law as given you by the court, you are guilty of willful perjury. It makes no difference what you think the law ought to be, you have no authority to consider or be controlled by anything else as law than that given you by the court.[19]

With regard to exemplary damages.

(2935) The court instructs the jury that they should be careful in fixing the amount of exemplary damages not to allow more than is just and reasonable, and not to allow their judgment to be swerved by passion.[20]

Tests in presence of jury as evidence.

(2936) The court instructs the jury that, while the testimony as to the tests made of ———was admitted in evidence, the jury should be cautioned against giving to this testimony any effect not contemplated nor warranted by law.[21]

[17] Wormley v. Hamburg, 46 Iowa, 144.
[18] Approved in Albright v. Brown, 23 Neb. 136.
[19] Approved in State v. Miller & Kremling, 53 Iowa, 154.
[20] Goddard v. Grand Trunk R. Co. of Canada, 57 Me. 202.
[21] Approved in Baran v. Reading Iron Co., 202 Pa. St. 274.

INDEX.

(REFERENCES ARE TO INSTRUCTION NUMBERS.)

A.

ABANDONMENT (see "Marine Insurance"),

of homestead, 1451, 1452.

ABATEMENT OF NUISANCE (see "Nuisance").

ABDUCTION, 1-9.

ABORTION, 10-14.

ABUTTING OWNERS, 15-17.

recovery by abutting owner in condemnation proceedings, 1120-1131.

ACCEPTANCE,

of performance of contract, 820.
of benefits as ratification of agent's act, 147-151.

ACCIDENT,

as defense to prosecution for homicide, 1535.

ACCIDENT INSURANCE, 1632-1635.

ACCOMMODATION NOTES, 2216-2224.

ACCOMPLICES,

credibility, 877, 878.

ACCORD AND SATISFACTION, 18-24.

ACCOUNT STATED, 25-33.

ACCRETIONS, 34-38.

title to, by adverse possession, 100, 101.

ACQUIESCENCE,

in boundary to establish location, 400.
retention of account as acquiescence in account stated, 28.

(REFERENCES ARE TO INSTRUCTION NUMBERS.)

ACT OF GOD, 39-44.

as defense to action for injuries caused by electricity, 1098-1099.

ADJOINING LAND OWNERS, 45-48.

measure of damages for removal of lateral support, 957.

ADULTERY, 49-51.

ADVERSE INTEREST,

as between agent and principal, 175, 176.
as between broker and principal, 421-423.

ADVERSE POSSESSION, 52-108.

as defense to ejectment, 1094.

ADVICE OF ATTORNEY,

as defense to action for malicious prosecution, 1865-1868.

ADVICE OF PHYSICIAN,

as defense to prosecution for abortion, 13.

AGENCY, 109-177.

see "Brokers," "Factors."
account stated with agent of one party, 30.
liability of county for negligence of agents, 839, 840.
of husband for wife, 1540-1542.
authority of agents of insurance company, 1596-1598.
responsibility of insurer for incorrect statements by his agent inducing issuance of policy, 1599.
making proof of loss by fire by agent, 1693.

ALIBI,

proof in criminal prosecution, 883-885.

ALTERATION OF INSTRUMENTS, 178-196.

ANIMALS, 197-227.

care of hired animals, 342, 343.
injuries caused by leaving horses unhitched and unattended, 2176.
injury to animals by railroad companies, 2482-2504.
injury caused by runaway horse, 1432-1433.
liability of carriers of live stock, 517-524.

ARBITRATION AND AWARD, 228-230.

(REFERENCES ARE TO INSTRUCTION NUMBERS.)

ARCHITECTS,

authority to employ person to work on building, 456.
certificate as condition precedent to recovery for work, 467-469.
rights and liabilities with reference to building and construction contracts, 472, 473.

ARREST, 231-236.

right of officer to kill in making an arrest, 1528-1530.
right to kill in resistance of unlawful arrest, 1534.

ASPORTATION,

an element of larceny, 1771-1773.

ASSAULT AND BATTERY, 237-246.

liability of insane person for assault, 1588.
measure of damages, 1011.
recovery of exemplary damages, 1027.

ASSIGNMENT FOR BENEFIT OF CREDITORS, 247-271.

ASSUMPSIT, 272-274.

ATTACHMENT,

forms in action for unlawful attachment, 275-279.

ATTORNEY AND CLIENT, 280-309.

advice of counsel as defense to malicious prosecution, 1865-1868.
measure of damages for wrongful discharge, 943.
settlement between parties without knowledge of attorney, 750.

AUCTIONS AND AUCTIONEERS,

action by seller against auctioneer to whom goods were sent by buyer, 2560.

AVOIDABLE CONSEQUENCES,

effect on recovery of damages, 907-917.

B.

BAGGAGE,

liability of carriers of baggage, 502, 503.

BAILMENTS, 310-353.

see "Depositaries," "Inns and Innkeepers," "Pledge," "Warehousemen and Warehouse Receipts."

(REFERENCES ARE TO INSTRUCTION NUMBERS.)

BANKS, 354-379.

acceptance of check as an accord and satisfaction, 21.
liability of drawer of check or draft, 2213-2215.

BASTARDY,

common law marriage as defense to bastardy proceedings, 1870.

BETTING AND GAMING, 380-383.

see "Gambling Contracts."
action to recover from stakeholder money placed in his hands as wager on result of an election, 1404.
charge of keeping blind tiger as libel or slander, 1796.

BICYCLES,

injuries to bicycle riders, 1434-1438.

BIGAMY, 384-386.

BILLIARDS,

billiard table as a gambling device, 382.

BILL OF LADING,

conclusiveness of bill of lading as to receipt of goods in good order, 506.

BOARDING HOUSES (see "Inns and Innkeepers").

BONA FIDE PURCHASERS (see "Negotiable Instruments").

BOOK MAKING (see "Gambling Contracts").

BOUNDARIES, 387-401.

see "Fences."

BREACH OF MARRIAGE PROMISE,

seduction under promise of marriage, 2636.
measure of damages, 944, 945.
effect of new promise on action for breach of marriage promise, 1852.

BREAKING,

what constitutes in prosecution for burglary, 483, 484.

BRIDGES,

criminal prosecution for destruction of bridge, part of highway, 1440-1448.
liability of carrier for injuries caused by defective bridge, 598.

(REFERENCES ARE TO INSTRUCTION NUMBERS.)

BRIDGES—Cont'd.

liability of county for injuries caused by carrying away of bridge, 841-843.
liability of municipality for defective bridges and approaches thereto, 2066, 2069.

BROKERS, 402-455.

authority of real estate agent to make representations as to quantity of land sold, 119.
recovery by broker for services in conducting gambling transaction, 1402.

BUILDING AND CONSTRUCTION CONTRACTS, 456-473.

amount of recovery for work and labor, 2914-2916.
measure of damages for breach, 942.

BUILDING AND LOAN ASSOCIATIONS,

forms in action by stockholder on paid up stock, 474-479.

BUILDINGS,

duty of inn keeper to provide fire escapes, 1587.
personal injuries sustained because of defects, 480, 481.

BURDEN OF PROOF (see "Evidence").

BURGLARY, 482-497.

C.

CARRIERS,

forms in general, 498-503.
carriers of freight, 504-516.
carriers of live stock, 517-524.
carriers of passengers, 525-702.
street railroad as carrier, 2700-2746.
duty of consignor to make reasonable efforts to secure other conveyance on refusal of carrier to transport goods, 915.
measure of damages for breach of contract by carrier, 946-951.
measure of damages for ejection of passenger, 949-951.
exemplary damages for ejecting passenger, 1028.
negligence of carrier co-operating with "Act of God" as defense, 41.

CAUSA MORTIS,

what constitutes gift, 1415.

(REFERENCES ARE TO INSTRUCTION NUMBERS.)

CAUTIONARY INSTRUCTIONS, 2917-2937.

instructions to disregard evidence, 1174, 1175.

CERTAINTY,

as essential of contract, 768.

CERTIFICATES OF DEPOSIT,

liability on certificates sent to bank for collection, 366, 367.

CERTIFIED CHECKS,

certification and payment, 354-359.

CHARACTER,

bad character of deceased to be considered on issue of self defense, 1519.
character evidence, 881, 882.

CHASTITY,

presumption in prosecution for abduction, 5.
charging a woman with lack of, as libel or slander, 1800.
justification under statute, for imputation of unchastity, 1838.
necessity of proof in prosecution for seduction, 2631-2636.

CHATTEL MORTGAGES, 703-723.

liability of mortgagee for taking chattels from possession of mortgagor, 2553.
measure of damages for wrongful levy on mortgaged property, 974, 975.

CHECKS (see "Banking"),

certification and payment of checks and drafts, 354-365.

CIRCUMSTANTIAL EVIDENCE,

in criminal prosecution, 860-866.

CIVIL DAMAGE ACT, 724-748.
recovery of exemplary damages, 1032-1035.

COLLATERAL SECURITY (see "Negotiable Instruments").

COLLISION,

between railroad trains, 2343-2346.
between street car and firewagon, 2655, 2656.

COLOR OF TITLE,

to support adverse possession, 73-79.

(REFERENCES ARE TO INSTRUCTION NUMBERS.)

COMMISSIONS,

right of broker to commissions, 424-455.

COMPARATIVE NEGLIGENCE (see "Negligence").

doctrine with relation to liability of carrier, 631-635, 2738.

COMPETENCY (see "Incompetency," "Insane Persons," "Infants").

to execute will (see "Wills").

COMPOUNDING FELONY,

note given to settle criminal offenses, 2208, 2209.

COMPROMISE AND SETTLEMENT, 749-753.

authority of attorney to enter into compromise, 289, 290.

CONCEALING BIRTH, 754-757.

CONCUBINAGE,

what constitutes purpose in abduction, 7.

CONNECTING CARRIERS,

liability of carrier of baggage, 502.
liability as to live stock, 522.

CONSIDERATION, 758-765.

compromise as consideration for note, 749, 764.
for fraudulent conveyance, 1365-1371.
of negotiable instruments, 2201-2207.
alteration of consideration of instrument, 179.

CONTAGIOUS DISEASES,

liability for communication of contagious diseases by animals, 205-208.
liability of landlord for infection, 1743.

CONTRACTS, 766-829.

see "Brokers," "Building and Construction Contracts," "Gambling Contracts," "Implied Contracts," "Incompetency," "Sales," "Work and Labor."
damages for breach of contract, 920-945.
effect of oral modification on Statute of Frauds, 1332.
establishment of broker's contract of employment, 424.
fraud as defense to action on contract, 1284-1287.
implied contract of carrier to deliver stock at a certain time, 519.

(REFERENCES ARE TO INSTRUCTION NUMBERS.)

CONTRACTS—Cont'd.

of agents, and liabilities, 109-177.
ratification of agent's contract by suit thereon, 152.
ratification of infant's contracts after attainment of majority, 1571.
to roast ore, 2023, 2024.
when duress will render contract voidable, 1086-1088.

CONTRIBUTORY NEGLIGENCE (see "Negligence").

CONVERSION, 830-834.

COOLING TIME,

in manslaughter, 1505-1507.

CORPORATIONS, 835-838.

see "Joint Stock-Companies,"
execution of corporate note, 1176.
fraud in sale of corporate stock, 1279-1282, 1325.
liability of employee to bias in employer's favor, 2917-2919.
liability for libel published by agents, 1789.
liability for services of attorney employed by president, 285, 286.
duty of jury to disregard fact that defendant is a corporation, 2921-2923.

COUNTIES, 839-844.

COVENANTS,

measure of damages for breach of covenants against encumbrances, 936-938.

CREDIBILITY OF WITNESSES (see "Witnesses"),

jury as judges of credibility, 2928, 2929.

CRIMINAL CONVERSATION,

measure of damages, 983.

CRIMINAL LAW, 845-889.

see also "Abduction," "Abortion," "Assault and Battery," "Betting and Gaming," "Concealing Birth," "Bigamy," "Burglary," "Homicide," "Larceny," "Rape," "Robbery," "Seduction."
burden of proof in prosecution of officers of insolvent bank for receiving deposit, 378.
criminal liability for libel or slander, 1834-1838.
prosecution for destruction of bridge, part of highway, 1440-1445.

(REFERENCES ARE TO INSTRUCTION NUMBERS.)

CRIMINAL LAW—Cont'd.

expression "Every man's house is his castle" explained, 241.
inference of intent from circumstances and conduct, 494.
prosecution for injuries to fences, 1238, 1239.
receipt of deposit by bank when insolvent, 368-379.
self defense as defense in prosecution for assault and battery, 238-240.
what constitutes aiding and abetting abortion, 14.

CROPS, 890, 891.

right to shoot animals destroying crops, 200, 201.

CRUELTY,

as ground for divorce, 1076-1078.

CRUELTY TO ANIMALS,

forms in prosecution for, 212, 213.

CUSTOMS AND USAGES, 892-896.

persons taking freight trains on which there is a custom to carry passengers, 557.
where evidence of custom admissible to construe building and construction contract, 466.

D.

DAMAGES, 897-1035.

allowance of exemplary damages, 2935.
duty of consignee to prevent further injury after delay, 514.
duty of owner of injured live stock to make claim for damages within reasonable time, 524.
for breach of contract of sale, 2614-2630.
aggravation of damages, 1013-1017.
for breach of instructions by factor, 1225.
in action for libel or slander, 1826-1833.
liability of carrier of freight, 512, 513.
for loss of gratuitous deposit, 1073, 1074.
for taking property by condemnation proceedings, 1111-1131.
for deficiency of property conveyed, 2791, 2792.
recoveries under Civil Damage Act, 741-747.
recovery for death by wrongful act, 1043-1066.

DATE,

alteration of date of instrument, 178.

DEATH (see "Homicide").

DEATH BY WRONGFUL ACT, 1036-1068.

(REFERENCES ARE TO INSTRUCTION NUMBERS.)

DECEIT (see "Fraud").

DEDICATION,

of highways, 1416-1427.

DEEDS, 1069-1072.

incompetency to execute deed, 1564.

DELEGATION OF DUTY,

right of master to delegate duties, 1894, 1895.

DELIVERY,

as element of sale of personal property, see "Sales."
of possession of pledge, see "Pledge."
of note in violation of instructions, 2211.
symbolical delivery of bailment, 214.

DEPOSITARIES, 1073-1075.

DEPOSITS,

liability of bank for receipt of deposit when insolvent, 368-379.

DESCRIPTION,

sufficiency of description of property covered by chattel mortgages, 704, 705.

DILIGENCE,

tests of diligence required of bailee, 316.

DISCHARGE,

action for wrongful discharge of servant, 1872-1875.

DISMISSAL,

of suit as a consideration, 765.

DIVORCE, 1076-1078.

DOWER, 1079, 1080.

DRAINS,

improper construction of drains diverting flow of surface water, 2754.
liability of city with respect to drains and sewers, 2128-2132.
measure of damages for breach of contract to keep ditch open, 925.

DRAM SHOP ACT, 724-748.

(REFERENCES ARE TO INSTRUCTION NUMBERS.)

DRUGGISTS, 1081-1083.

measure of recovery for death caused by neglect in selling poison, 1047.

DRUNKARDS, 1084, 1085.

DURESS, 1086-1088.

E.

EJECTION OF PASSENGERS,

liability of carrier for, 567-580, 1028.

EJECTMENT, 1089-1095.

see "Adverse Possession."
based on tax deed, 2755, 2756.

ELECTION,

betting on election, 1404.

ELECTRICITY, 1096-1105.

see "Street Railways."

ELEVATORS,

liability of master for injury to servant, 1915.

EMINENT DOMAIN, 1106-1133.

ENTRY,

as element of burglary, 489, 490.

ESTATES OF DECEDENTS, 1134-1142.

ESTOPPEL, 1143-1147.

acceptance of benefit by principal as ratification of agent's act, 147-151.
of principal to deny authority of broker, 403.
to assert prohibition against operating factory at night, 1692.
to insist on forfeiture of insurance policy, 1644, 1645.

EVICTION,

as defense to action for rent, 1738-1748.

EVIDENCE, 1148-1175.

proofs of loss (see "Insurance").
effect to be given to admissions, 353.
admissions and confessions in criminal prosecution, 886-889.

(REFERENCES ARE TO INSTRUCTION NUMBERS.)

EVIDENCE—Cont'd.

character evidence in criminal prosecution, 881, 882.
circumstantial evidence in criminal prosecution, 860-866.
competency and credibility of witnesses, 2899-2913.
duty of jury to determine case on evidence, 2932, 2933.
evidentiary presumptions in criminal prosecutions, 854-859.
fact of injury as proof of negligence, 2153-2161.
fact of killing stock as tending to show insufficiency of fence, 2482-2496.
of contributory negligence by persons injured at railroad crossing, 2441-2447.
of sale, 2562.
parol evidence to show agreement as to liability on note, 2250.
presumption as to place where liquors causing intoxication were obtained, 740.
presumption that one intends natural consequences of his own act, 1472.
prima facie case made by introduction of notes, 2248, 2249.
proof of alibi in criminal prosecution, 883-885.
proof of charge of malpractice, 2313-2321.
proof of fact of nuisance, 2263-2266.
proof of ownership of animal, 214.
proof of hand writing, 1180, 1181, 1155, 1156.
reputation to prove vicious propensity of animal, 223.
to establish liability of master for injuries to servant, 2002-2008.
values, 2783, 2784.
where declaration by prior owner as to location of boundary or by agent's grantees, 401.
X-ray photographs, 2322, 2323.
presumptions and burden of proof in actions for libel or slander, 1803-1825.
presumptions and burden of proof in prosecution for publication of libel, 1835-1836.
presumptions and sufficiency of evidence as to fraudulent conveyance, 1393-1401.
presumptions based on dangerous nature of gas, 1405.
presumptions of innocence and degree of proof in criminal prosecution, 845-853.
burden of proof,
in actions for injury to passenger, 693-702.
as to "Act of God," 43, 44.
as to performance of contract, 825, 826.
as to relation of carrier and passenger, 566.
as to valid execution of will, 2898.

(REFERENCES ARE TO INSTRUCTION NUMBERS.)

EVIDENCE—Cont'd.

in action against mortgagee for wrongfully taking chattels from possession of mortgagor, 2553.
in action for wrongful attachment, 279.
in ejectment, 1095.
of contributory negligence, 2194-2200.
of contributory negligence and freedom therefrom of passenger, 690-692.
of location of boundaries by parties, 399.
of negligence, 2153-2156.
of negligence causing injury to traveler on street, 2124.
of negligence in actions for injuries caused by animals, 227.
of negligence in diversion of flow of surface water by railroad company, 2753.
of set-off, 2638.
of warranty of personalty sold, 2599, 2600.
to explain alteration in instrument, 195, 196.
to impeach account stated, 32, 33.
to support adverse possession, 72.
that liquor sold by defendant caused intoxication under Civil Damage Act, 739.

EXCAVATIONS,

duties and liabilities of land owners, 45-48.
liability of municipality for excavations in streets, 2074, 2075.
liability of private person for injuries caused by excavation in highway, 1439.

EXECUTION,

priority between chattel mortgage and execution, 720-722.

EXECUTION OF WRITTEN INSTRUMENTS, 1176-1182.

see "Negotiable Instruments."
wills, see "Wills."
blank indorsement of note, 2231, 2232.

EXEMPLARY DAMAGES (see "Damages").

EXEMPTIONS, 1183-1186.

conveyance of exempt property as fraudulent, 1377, 1378.

EXPECTANCY OF LIFE,

as determining amount of damages for death by wrongful act, 1056-1061.

(REFERENCES ARE TO INSTRUCTION NUMBERS.)

EXPERT TESTIMONY

admissibility, 1153.
opinion evidence as to propensity of animal causing injury, 224.
instruction as to weight, 2924-2926.
to show competency to execute will, 2870.

EXPLOSIVES,

duty of master to instruct servant as to method of handling explosive, 1933-1934.

EXPRESS MESSENGER,

liability of carrier of passengers for injury to express messenger, 559.

F.

FACTORS, 1187-1225.

FALSE IMPRISONMENT, 1226-1233.

measure of damages for false imprisonment, 980, 981.
recovery of exemplary damages, 1031.

FALSE REPRESENTATIONS (see "Fraud").

FALSUS IN UNO, FALSUS IN OMNIBUS, 2908-2912.

FEAR,

as element of robbery, 2557-2558.

FELLOW SERVANTS, 1936-1950.

FENCES, 1234-1239.

duty of railroad companies as to fences on right of way, 2482-2496.
enclosure to support title by adverse possession, 89-91.
sufficiency of fences to restrain trespassing animals, 188, 199.

FIDELITY BONDS, 1240-1243.

FIDUCIARIES,

see "Brokers," "Agency," "Attorney and Client."
fraud by one occupying fiduciary relation, 1323.

FINDING OF LOST GOODS,

as larceny, 1759-1761.

(REFERENCES ARE TO INSTRUCTION NUMBERS.)

FIRE INSURANCE, 1636-1699.

duty of inn keeper to provide, 1587.

FIRE INSURANCE, 1636-1699.

FIRES, 1244-1259.

see "Insurance," for fire insurance.
liability of carriers for destruction of freight by fire, 509, 510.
care required of master in regard to place provided for escape in case of fire, 1914.
injuries to persons by sparks from train on elevated railroad, 2672.
liability of railroad company for fire set out by locomotives, 2505-2529.
measure of damages, 964.

FIXTURES,

machinery annexed to mining lands, 2014-2019.

FLIGHT,

presumption from flight, 855-858.

FORFEITURE,

of lands under West Virginia Revenue Law, 2757-2759.
of policy, see "Insurance."

FORMER ADJUDICATION, 1260, 1261.

FORNICATION,

occasional acts of fornication insufficient to prove adultery, 49.

FRATERNAL AND MUTUAL BENEFIT ASSOCIATIONS, 1262, 1263.

FRAUD, 1264-1330.

see "Fraudulent Conveyances."
constructive fraud in fraudulent conveyance, 1341.
fraudulent concealment of cause of action as effecting running of statute of limitations, 1844.
in assignment for benefit of creditors, 249-264.
in sale of real property, 2787-2789.
liability of principal for fraud of agent, 141.
measure of damages for fraud in sale of land, 984, 985.
of landlord as defense to action for rent, 1737.
retention of possession by mortgagor as evidence of fraud, 708-711.
right of broker to commissions as dependent on good faith, 452.

(REFERENCES ARE TO INSTRUCTION NUMBERS.)

FRAUDS, STATUTE OF, 1331-1333.

FRAUDULENT CONVEYANCES, 1334-1401.

FRAUDULENT REPRESENTATIONS,

ratification of agent's representations by principal, 146.

FREIGHT,

forms applicable in actions against carriers of freight, 504-516.

FUTURE ADVANCES,

mortgages to secure, 706.

G.

GAMBLING,

elements of offense of keeping a gambling house, 380, 381.

GAMBLING CONTRACTS, 1402-1404.

GAS, 1405-1411.

GIFTS, 1412-1415.

H.

HEALTH (see "Nuisance").

liability of landlord for spreading contagious disease, 1733.

HIGHWAYS, 1416-1449.

injuries by street cars (see "Street Railways").
injuries caused by defective streets and side-walks, see "Municipal Corporations."
rights and liabilities of abutting owners, 15-17.
recovery of exemplary damages against overseer of highways for moving fence, 1023, 1024.
injuries caused by careless driving of person injured, 2174, 2175.
imputation of driver's negligence to occupant of vehicle, 2189-2193.
railroad accidents at crossings, 2348-2450.
care required of person in vehicle driven by another over railroad crossing, 2414.
trespass against overseer of highways, 2768.

HOMESTEAD, 1450-1452.

HOMICIDE, 1453-1536.

apprehension of bodily harm to another as justifying homicide, 1041.

(REFERENCES ARE TO INSTRUCTION NUMBERS.)

HOMICIDE—Cont'd.

charge of murder as libel or slander, 1792.
elements of homicide by abortion, 10.
recovery against liquor seller for homicide committed by intoxicated person, 735.
self defense as justification in action for death by wrongful act, 1038-1040.

HOSTILITY OF POSSESSION,

as element of adverse possession, 66-72.

HUSBAND AND WIFE, 1537-1557.

coercion by husband as defense to prosecution for homicide, 1536.
compensation of mother for care of child, 2276.
conveyance by husband to wife as fraudulent, 1375, 1376.
recoveries by wife under Civil Damage Act, 724-748.

I.

ICE,

liability of city for injuries caused by ice on sidewalk, 2083-2085.

IMPEACHMENT (see "Witnesses").

burden of proof to impeach account stated, 32, 33.
effect of impeachment of witnesses in criminal prosecution, 870, 871.

IMPLIED CONTRACTS, 1558-1563.

see "Sales."
recovery by child for services rendered parent, 2271-2275.

IMPLIED MALICE,

as element of murder, 1484-1487.

IMPLIED POWERS,

of agent, 121-123.

IMPLIED WARRANTY (see "Sales").

IMPROVEMENTS,

right of tenant to set off value against rent, 1750.

IMPUTED NEGLIGENCE (see "Negligence").

INCOMPETENCY, 1564-1570.

(REFERENCES ARE TO INSTRUCTION NUMBERS.)

INFANTS, 1571.

see "Parent and Child."
application of rule of contributory negligence to children, 2170, 2172.
contributory negligence of children injured by street car, 2685-2688.
duty of master to give instructions to young and inexperienced employees, 1935.
duty of railroad company as to children on railroad track, 2459-2461.
effect of infancy on statute of limitations, 1843.
imputed negligence, 2184-2188.
injuries to boys stealing rides on street cars, 2667-2671.
liability of city for injuries to children, 2125, 2126, 2147-2152.
possession to support adverse possession as against persons under disability, 103.

INNS AND INNKEEPERS, 1572-1587.

INSANE PERSONS, 1588.

competency to execute will, see "Wills."
incompetency to contract because of insane delusions, 1568, 1569.
implication of malice in filing information of insanity, 1818.
what constitutes insanity within criminal statutes, 879.

INSOLVENCY,

charge of insolvency as libel or slander, 1799.
liability of bank for receipt of deposits when insolvent, 368-379
manner of determining cause of insolvency of bank, 371-376.

INSURANCE, 1589-1706.

see "Fraternal and Mutual Benefit Associations."
of property in warehouse, 2802.

INTENT,

as element of fraud, 1288-1293.
as element of homicide, 1469-1480.
as element of larceny, 1761-1766.
as element of burglary, 491.
intention to hold adversely as element of adverse possession, 63-65.
necessity to constitute fraudulent conveyance, 1336-1340, 1384-1386.
office in interpretation of contracts, 790-792.

(REFERENCES ARE TO INSTRUCTION NUMBERS.)

INTEREST (see "Usury").

allowance of interest as damages for breach of contract of sale, 2629.
effect of alteration of instrument as to interest, 182-186.

INTOXICATION,

what constitutes, 1084.
as contributory negligence by person injured at railroad crossing, 2420, 2421.
use of intoxicants as contributory negligence of passenger, 647, 648.
contributory negligence of person injured by street car, 2690.
effect of intoxication of one committing crime, 880, 1475, 1476.
effect on competency to contract, 1570.
right of inn keeper to refuse entertainment to drunken person, 1576.
instructions applicable in actions under Civil Damage Act 724-748.

J.

JOINT ADVENTURES,

between attorney and client, 303.
purchase and re-sale of lands, 808.

JOINT LIABILITY, 1707.

see "Negotiable Instruments."
for illegal arrest, 1229, 1230.
under Civil Damage Act, 724-731.

JOINT STOCK-COMPANIES, 1708, 1709.

JUDGMENTS (see "Former Adjudication").

JURY,

exclusive judges of weight of testimony, 1173

JUSTIFICATION (see "Libel and Slander").

K.

KNOWLEDGE (see "Notice").

L.

LANDLORD AND TENANT, 1710-1756.

see "Use and Occupation."
duty of tenant to render damages for breach of lease as light as possible, 910.

(REFERENCES ARE TO INSTRUCTION NUMBERS.)

LANDLORD AND TENANT—Cont'd.

lease for term not exceeding one year as within statute of frauds, 1333.
possession of tenant as possession of landlord to support adverse possession, 95.
title to the rents of wife's separate estate, 1543-1545.

LARCENY, 1757-1779.

charge of larceny as libel or slander, 1794-1796.

LATENT DEFECTS,

in machinery causing injury to servant, 1923-1925.
in streets and side-walks, 2063, 2064.

LAW OF THE ROAD (see "Highways").

LEASES (see "Landlord and Tenant").

LIBEL AND SLANDER, 1780-1838.

measure of damages, 982.

LICENSE,

justification of trespass under license, 2770, 2771.
liability of liquor licensee for sales made by successor, the license not having been transferred, 733, 734.

LIEN,

of bailee, 350, 351.
of factor, 1217-1222.
of attorney for services, 208.
priority between chattel mortgage and agister's lien, 718, 719.
lien of carrier for freight on replevin by shipper, 516.
for storage of property, 2809-2813.

LIFE INSURANCE, 1600-1631.

LIMITATION OF ACTIONS, 1839-1853.

acquisition of title to realty by adverse possession, 52-108.

LIMITATION OF LIABILITY,

of connecting carriers, 511, 523.

LOCATION,

of boundaries by interested parties, 394-398.

(REFERENCES ARE TO INSTRUCTION NUMBERS.)

LOGS AND LOGGING,

rights and liabilities as between logs and vessels as to use of water course, 2136, 2137.

LOITERING,

recovery by wife against a liquor seller for permitting husband to loiter, 728.

M.

MALICE,

as element of malicious prosecution, 1854, 1855.
definition of malice aforethought, 1482, 1483.
inference of malice in action for libel or slander, 1815-1818.
necessity of finding of actual malice in publication of libel in course of judicial proceedings, 1805.

MALICIOUS PROSECUTION, 1854-1869.

liability for arrest without warrant, 231-236.
measure of damages for malicious prosecution, 977, 979.
recovery of exemplary damages, 1029, 1030.

MALPRACTICE (see "Attorney and Client," "Physicians and Surgeons").

MANSLAUGHTER, 1490-1507.

MARINE INSURANCE, 1700-1706.

MARRIAGE, 1870.

see "Bigamy."

MASTER AND SERVANT, 1871-2013.

liability of employee to bias, 2917-2919.
liability of carrier for acts of brakemen in attempting to assist passengers to alight, 625.
duty required of carriers' employees, 538-541.
contributory negligence of passenger obeying direction of carrier's servant to alight, 682-686.
liability of county for negligence of servants, 839, 840.
duty of servant wrongfully discharged to seek other employment, 911, 912.
measure of damages for wrongful discharge, 922.
injuries to persons employed in mines, 2021, 2022.
liability of master to parent of minor servant, 2269, 2270.
liability of railroad company for injury to employee of another company, 2465.

(REFERENCES ARE TO INSTRUCTION NUMBERS.)

MASTER AND SERVANT—Cont'd.

measure of liability of master to parent of minor servant for personal injuries, 1009.

MEANDER LINES (see "Boundaries").

MENTAL SUFFERING,

as element of damage, 905, 906, 999-1004.
of survivors as element of damage in action for death by wrongful act, 1048-1055.

MESNE PROFITS, 2014-2019.

MINES AND MINERALS, 2020-2024.

measure of damages for taking coal from mine of another, 960.
trespass for mesne profits of mining land recovered in former ejectment suit, 2014-2019.
diversion of spring by removal of coal, 2830.

MISCARRIAGE,

intent to produce as essential of abortion, 11.

MISTAKE,

effect of alteration of instrument made by mistake, 193.
responsibility of principal to third persons for mistake of broker, 402.

MITIGATION OF DAMAGES, 1013-1017.

MODIFICATION OF CONTRACT, 827-829.

MONEY,

liability of innkeeper for loss of guest's money, 1580, 1581.

MONEY DUE AND RECEIVED,

action for, 272, 273.

MONEY PAID,

action for, 274.

MOTIVE,

effect on damages of motive for breach of contract, 903.
inference of improper motive inducing false imprisonment, 1233.
presumption from absence of motive in criminal prosecution, 854.

(REFERENCES ARE TO INSTRUCTION NUMBERS.)

MUNICIPAL CORPORATIONS, 2025-2134.

animals running at large within corporate limits of town, 210, 211.
liability of municipality for destruction of lands by fire communicated from inflammable material in street, 1245-1259.
liability of police commissioners for ordering illegal arrest, 1231-1232.
measure of recovery by water company from village for erecting water-works and violating contract between village and water company, 923, 924.
ordinances relating to operation of street railways, 2647-2651.
violation of ordinances by injured persons as contributory negligence, 2418.
violation of speed ordinances by railroads, as negligence, 2335.

MURDER (see "Homicide").

MUTUALITY,

as essential of contract, 768.

N.

NAVIGABLE WATERS, 2135-2137.

high water mark as boundary, 391-393.
right to accretions, 34-38.

NECESSARIES,

liability for family necessaries, 1548-1557.

NEGLIGENCE, 2138-2200.

injuries to servant, see "Master and Servant."
definition, 536, 537.
measure of damages for personal injuries, 986-1012.
affecting bailment, 310-353.
duty of one injured to take proper care, 917.
care required in general of carrier of passengers, 525-554.
ejectment of passenger by carrier, 567-580.
taking on passengers, 581-591.
liability of carrier as to negligence in setting down passengers, 604-628.
carrier of passengers as insurer, 532, 533.
care as to stations, tracks and equipment of carriers, 592, 603.
ordinary care of passenger defined, 640-642.
risks assumed by passenger, 643.
diversion of flow of surface water, 2753.
injuries caused by fires, 1244-1259.

(REFERENCES ARE TO INSTRUCTION NUMBERS.)

NEGLIGENCE—Cont'd.

injuries from explosion and escape of gas, 1405-1411.
injuries resulting from defective highway, 1428-1439.
injuries to persons by sparks from train on elevated railroad, 2672.
injuries to persons employed in mines, 2021-2022.
injuries to tenants or occupants of leased premises, 1730-1733.
in towing vessels, 2763-2765.
transmission and delivery of telegraph messages, 2760-2762.
injuries by trespassing animals, 197-227.
injuries caused by defective turnpike, 1446-1448.
injuries from electricity, 1096-1105.
loss of guests' property, 1580-1586.
liability of abutting owner for injuries to passer-by, 16, 17.
'Act of God,' as defense, 39-44.
liability of broker to principal, 404, 405.
liability of county, 839, 843.
liability of landlord or tenant for injuries to third persons 1751-1755.
liability of master for injuries to third persons, 2009-2013.
liability of municipal corporation for injuries caused by defective streets or side-walks, 2027-2127.
of physicians, 2296-2323.
of railroads, 2333-2529.
of street railways, 2639-2736.
of street railroad company as carrier, 2700-2746.
ordinary or reasonable skill in care of bailment, 335, 336.
personal injuries sustained because of defects in building, 480, 481.
presumption of negligence from happening of injury, 695-698.
recovery of exemplary damages for personal injuries, 1025, 1026.
statutory provision requiring contributory negligence to be criminal, 657-661.
contributory negligence defined, 629, 630.
use as determining question of contributory negligence of passenger, 678.
instruction eliminating contributory negligence of carrier of passengers, 548, 549.
contributory negligence in use of drug, 1082.
contributory negligence of bailor, 338-340.
contributory negligence of passenger defeating action for injuries, 629-692.
contributory negligence of passenger injured while alighting, 628.

(REFERENCES ARE TO INSTRUCTION NUMBERS.)

NEGLIGENCE—Cont'd.

contributory negligence as defense to action for death by wrongful act, 1042.

NEGOTIABLE INSTRUMENTS, 2201-2251.

see "Consideration," "Execution of Written Instruments," "Usury."
action on note payable when railroad shall be completed, 805-807.
alteration of negotiable instruments, 178-196.
compromise as consideration, 749, 764.
misstatement by agent of insurance company, as defense to action on premium note, 1623.
duty of pledgee of commercial paper, 2331.
giving note as an accord and satisfaction, 23.
inability to recover on notes given as consideration of fraudulent conveyance, 1388, 1389.
letters patent as consideration for note, 760-763.
warehouse receipts, 2825-2827.

NEW PROMISE,

to extend statute of limitations, 1851, 1852.

NOTICE,

and proof of death of insured, 1627-1630.
avoidance of policy by failure to give notice of subsequent insurance, 1669.
of defects in streets, 2089-2096.
constructive notice of defects in streets and sidewalks, 2097-2103.
knowledge by party to be estopped, 1147.
knowledge of falsity of statement as element of fraudulent representation, 1298-1304.
knowledge of grantee, or fraudulent participation in fraudulent conveyance, 1379-1383.
necessity of notice of occupancy of owner as element of adverse possession, 70.
necessity of notice to parties to arbitration, 228.
of unrecorded deed, 1072.
to agent as notice to principal, 160-163.
to attorney as notice to client, 294-296.
to city of intention to sue, 2134.
to liquor seller under Civil Damage Act, 732.
of facts as essential to ratification of agent's act, 156.
of vicious propensity of animals causing injury, 215-224.

(REFERENCES ARE TO INSTRUCTION NUMBERS.)

NOTICE—Cont'd.

effect on contributory negligence of bailor of knowledge that bailee was careless, 339.
ignorance of female's age as defense to abduction, 3.

NUISANCE, 2252, 2266.

liability for casting refuse matter into river, 2822, 2823.
measure of damages, 970, 971.

O.

OFFER AND ACCEPTANCE,

as condition to contract, 766-774.

OFFICERS,

liability of officer for false imprisonment, 1226, 1227.
liability on bond of county treasurer, 1240.
right of officer to kill in making an arrest, 1528-1530.

ORDINANCES (see "Municipal Corporations").

P.

PAPER TITLE,

to support adverse possession, 78.

PARENT AND CHILD, 2267-2276.

see "Infants."
liability of members of family to pay for board, services, etc., 1561-1563.
measure of damages for injury to child, 1007-1009.
negligence of parent as defense to abduction, 9.

PAROL EVIDENCE,

admissibility, 1154-1156.

PARTIALITY,

setting aside award for partiality of arbitrators, 230.

PARTNERSHIP, 2277-2291.

see "Joint Stock Companies."
action between partners engaged in book making, 1403.
interpretation and effect of assignment by firm, 268, 269.
liability of partner for act of co-partner instituting prosecution maliciously, 1869.

(REFERENCES ARE TO INSTRUCTION NUMBERS.)

PASSION,
to reduce homicide to manslaughter, 1503, 1504.

PAUPERS, 2292.

PAYMENT, 2293-2295.
authority of agent to receive payment onsubscription, 120.
effect of alteration of instrument as to mode of payment, 180.
of checks by bank, 354-365.
of notes, 2243.
part payment to extend statute of limitations, 1848.
reception of less amount as satisfaction, 20-22.
recovery back of payment, 515.
recovery back of usurious interest, 2780-2782.
right of factor to receive, 1210.

PERCOLATING WATERS, 2828.

PERJURY,
charge of false swearing as libel or slander, 1793.

PRESCRIPTION,
to establish highway, 1421-1427.

PHYSICIANS AND SURGEONS, 2296-2323.
liability of parent for medical services rendered to child, 2268.
measure of damages for malpractice, 1012.

PLEDGE, 2324-2332.
see "Negotiable Instruments."
power of factor to pledge, 1208, 1209.
note as collateral security, 2241, 2242.

POSSESSION (see "Adverse Possession").
retention of possession as constituting fraudulent conveyance, 1358-1365.
under chattel mortgage, 708-714.

PREMEDITATION,
as element of homicide, 1466-1468.

PREPONDERANCE OF EVIDENCE (see "Evidence").

PRINCIPAL AND AGENT (see "Agency").

PRIORITIES,
between chattel mortgage and other liens or levies, 718-722.
between execution and assignment, 270, 271.

(REFERENCES ARE TO INSTRUCTION NUMBERS.)

PRIVILEGED COMMUNICATIONS (see "Libel and Slander").

PROBABLE CAUSE,

as defense to malicious prosecution, 1856-1864.

PROOFS OF LOSS (see "Insurance").

PROSTITUTION,

what constitutes purpose in abduction, 8.

PROTEST (see "Negotiable Instruments").

PROVINCE OF COURT AND JURY (see "Cautionary Instructions").

PROVOCATION,

effect of provocation as justification for use of slanderous words, 1783.
in manslaughter, 1501, 1502.

PROXIMATE CAUSE (see "Damages").

of injury as fixing liability for negligence, 2152-2164.
of injury caused by street car, 2730.
of injury treated by surgeon, 2304-2307.

PUBLICATION,

as element of libel, 1788.

PUBLIC ENEMY,

acts of public enemy as defense to action against carriers, 503.

PUBLIC POLICY, 777.

PUFFING, 1277.

R

RACING,

liability for accident on race track, 2152.

RAILROADS, 2333-2529.

liability for injury to employees, see "Master and Servant."
diversion of flow of surface water by railroad company, 2749-2753.
instructions applicable to carriers, 598-702.
recovery by abutting owner for occupation of street by railroad, 1120-1130.

RAPE, 2530-2549.

ravishment as aggravation of assault and battery, 246.

(REFERENCES ARE TO INSTRUCTION NUMBERS.)

RATIFICATION,

by principal of irregular sale by broker, 420.
of acts of agent, 142-159.
of alteration of instrument, 190-192.
of attorney's acts by client, 292, 293.
of violation of agent's instructions as dependent on knowledge, 177.

REASONABLE CARE (see "Negligence").

REASONABLE DOUBT, 847-852.

RECEIPTS,

warehouse receipts, see "Warehousemen and Warehouse Receipts."

RECEIVERS,

right of receiver to sue on note, 2245.

RECORDING OF WRITTEN INSTRUMENTS, 2550.

RECOVERY OVER,

by city for injuries caused by defects in streets or side walks, 2127.

RENEWAL,

of chattel mortgages, 723.
of lease, 1719-1727.

REPARATION,

effect to mitigate damages, 1015.

REPLEVIN, 2551-2553.

against one claiming right of possession as administrator, 1137.
by one partner against another, 2290, 2291.

REPESENTATIONS (see "Fraud").

effect on fire insurance policy of misstatemeent made by insured, 1637-1653.
inducing issuance of life insurance policy, 1602-1622.

RESCISSION,

of sale of personal property, 2603-2613.

RESTAURANTS (see "Inns and Inn keepers").

(REFERENCES ARE TO INSTRUCTION NUMBERS.)

RETAINER,

of attorney, 280-286.

RETRACTION,

of gift by donor, 1415.

REWARD,

intent to hold property for reward as larceny, 1764.

RISKS,

assumed by servant, 1951-1982.

ROBBERY, 2554-2558.

RULES,

duty of master to promulgate rules for government of employees, 1932.
right of carrier to make rules concerning carriage of stock, 575.

S.

SALES,

of personal property, 2559-2630.
right of broker to commission, 424-455.
rights of purchaser from fraudulent grantee, 1390-1392.
allowance of damages for consequences that might have been avoided, 909.
authority of agent to warrant goods, 124.
by factors, 1187-1225.
false representations, 1272-1276.
measure of damages for breach of contract of sale, 926-934.
of crops, 890, 891.

SCALPER'S TICKETS,

person attempting to ride on ticket purchased from scalper as passenger, 560-562.

SCHOOLS,

chastisement of pupils, 244, 245.

SEALS,

attachment of seal as alteration of instrument, 187-189.

SEDUCTION, 2631-2636.

SELF DEFENSE,

as defense in prosecution for homicide, 1508-1517.

(REFERENCES ARE TO INSTRUCTION NUMBERS.)

SELF DEFENSE—Cont'd.

as defense to action for death by wrongful act, 1038-1040.
duty to retreat or escape before resorting to forcible defense, 1520-1527.

SEPARATE ESTATE OF MARRIED WOMEN, 1545-1549.

SET-OFF AND COUNTERCLAIM, 2636-2638.

by factor, 1223, 1224.
counterclaim to extend statute of limitations, 1847.
set-off of breach of warranty when property is not returned, 2621.
set-off of damages for breach of warranty against notes given for purchase price, 2622.
set-off of damages from breach of warranty, 2619.
set-off of damages sustained through false representations as to real property sold, 2790.

SEWERS,

liability of municipality for defective sewers or streets, 2076, 2077.

SHIPPING,

injury to passenger attempting to alight from steam boat, 499-501.

SIDEWALKS (see "Municipal Corporations").

SIGNALS,

duties as to signals on rear of trains, 2466, 2387-2390.
duty of railroad companies as to signals at crossings, 2372-2390.
failure to give signals as excusing want of care by railroad company, 2408-2412.
reasonableness of rule providing that car may not start without signal from conductor, 2708.
street railways, 2646, 2647.
warnings to animals on track, 2498-2500.

SIGNS,

liability of municipality for injuries caused by overhanging signs, 2080.

SNOW,

liability of city for injuries caused by snow on sidewalk, 2083-2085.

(REFERENCES ARE TO INSTRUCTION NUMBERS.)

SPRINGS,

liability for destroying, 2829, 2830.

STAGES,

duties of carriers by stage coach, 498.

STATUTE OF FRAUDS, 1331-1333.

STREET RAILWAYS, 2639-2746.

SUBSCRIPTION, 2747, 2748.

action on subscription to corporate stock, 835-838.
authority of agent to receive payment of subscription, 120.
liability on subscription contract to joint stock company, 1708, 1709.
measure of damages for breach of contract of subscription, 921.

SUBSTANTIAL PERFORMANCE,

of contracts, 800, 802.

SUBSTITUTED PERFORMANCE,

of contracts, 797, 799.

SUICIDE,

threat of suicide by woman as defense to prosecution for abortion, 12.

SUNDAY,

delivery of bailment on Sunday and subsequent ratification, 316.

SURETYSHIP (see "Fidelity Bonds").

sufficiency of consideration for, 759.

SURFACE WATERS, 2749, 2754.

see "Waters and Water-Courses."
duty of one injured by diverted surface waters to use efforts to mitigate amount of injury, 914.
liability of city for diversion of surface water by change of grade, 2131-2133.

SURVEYS (see "Boundaries").

T.

TACKING,

possession, 104-108.

(REFERENCES ARE TO INSTRUCTION NUMBERS.)

TAXATION, 2755-2759.

payment of taxes as requisite of actual possession to support adverse possession, 96.

TELEGRAPH AND TELEPHONE COMPANIES, 2760-2762.

duty of sender to use diligence to avoid or lessen damages caused by error in transmission of telegram, 916.
measure of damages for delay in transmission or delivery of telegrams, 952-954.

TENDER,

necessity of tender of performance of contract, 794.

TESTS,

in presence of jury as evidence, 2936.

THREATS,

as justifying homicide, 1518.

TIME,

duration of possession to support adverse possession, 102-108.
effect of alteration of instrument as to date, 178.
termination of agency, 112-115.
termination of gratuitous bailment, 346-348.

TORTS (see "Negligence," "Carriers," "Railroads," "Street Railways").

liability for joint wrong, 1707.
liability of firm for tort of one partner, 2288, 2289.
liability of principal for torts of agent, 140.
measure of damages for torts, 956-985.

TOWING, 2763-2765.

TRESPASS, 2766-2771.

by tenant against landlord, 1728, 1729.
ejection of passenger from street car, 2665.
liability of railroad for ejection of trespassers, 2340-2342.
for mesne profits of mining land recovered in former ejectment suit, 2014-2019.
may not be repelled by deadly weapon, 243.
recovery of exemplary damages, 1020-1024.
right to eject trespasser, 242.
trespassing animals, 197-227.

TRIAL,

authority of attorney in conduct of action, 287, 288.

(REFERENCES ARE TO INSTRUCTION NUMBERS.)

TRUSTS,

when statute of limitations begins to run as against beneficiaries, 1854.

TURNPIKES (see "Highways").

U.

UNAVOIDABLE CASUALTY (see "Negligence"),

effect on liability of bailee, 330, 331.

UNDUE INFLUENCE,

inducing sale of real property, 2789.
inducing execution of a will, 2884-2893.

USE AND OCCUPATION, 2772-2775.

USER,

to establish highway, 1421-1427.

USURY, 2776-2782.

plea of usury in action on note by purchaser, 2246, 2247.

V.

VALUES, 2783, 2784.

VENDOR AND PURCHASER,

liabilities on sale of real property, 2785-2792.
measure of damages for breach of contract to convey, 935.
measure of damages for failure of defendant to procure deed to a piece of land from third person, 941.
right of broker to commissions, 424-455.
holding by vendee as adverse to vendor, 69.
fraud of vendor in misstating amount of land sold, 1283.

VERDICT, 2793.

form in condemnation proceedings, 1133.
instruction to be given in case of special verdict, 1167-1170.

VICE PRINCIPALS (see "Master and Servant").

VICIOUS PROPENSITY,

knowledge of vicious propensity of animal, 215-224.

VINDICTIVE DAMAGES, 1018-1035.

(REFERENCES ARE TO INSTRUCTION NUMBERS.)

W.

WAIVER,

of breach of contract, 818.
of delay in performance of contract, 819.
of delay in time of performance of building and construction contract, 465.
of exemption, 1183-1185.
of lien by bailee, 351.
of rights under contract, 816, 817.
of warranty by acceptance, 2597, 2598.
of right to avoid life policy for misrepresentations, 1646.
of right to avoid or forfeit fire insurance policy, 1682-1692.
authority of agent to waive terms of policy, 1698.

WAREHOUSEMEN AND WAREHOUSE RECEIPTS, 2794-2827.

carriers of freight as warehousemen, 505.

WARRANT,

liability for arrest without warrant, 231-236.

WARRANTY,

by factor, 1198, 1199.
by seller of personalty, 2585-2602.
in life insurance, 1602-1605.

WATERS AND WATER-COURSES, 2828-2833.

see "Navigable Waters," "Surface Waters."
liability for flooding of premises caused by defective drains and sewers, 913, 2128-2130.
measure of damages for destruction of spring, 963.
measure of damages for injuries to land caused by overflow and diversion, 965-969.
measure of damages for polluting stream, 959.
obstruction of water course by dam as nuisance, 2252-2257.

WEAPONS (see "Homicide").

WILFULNESS,

as element of homicide, 1488, 1489.

WILLS, 2834-2898.

WITNESSES, 2899-2913.

character evidence in criminal prosecutions, 881, 882.
credibility of accomplice, 877, 878.

(REFERENCES ARE TO INSTRUCTION NUMBERS.)

WITNESSES—Cont'd.

credibility of defendant as a witness in criminal prosecution, 874-876.

credibility of witnesses and effect of evidence in criminal prosecution, 867-873.

WORK AND LABOR, 2914-2916.

recovery for part performance or imperfect performance of contract, 812-815.

X.

X-RAY PHOTOGRAPHS,

admissibility in malpractice cases, 2322, 2323.